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ADEQUATE PROTECTION TO REFUGEE WOMEN

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Declaration:

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirement for the Masters in Law in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Masters in Law dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

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THE FAILURE OF THE EUROPEAN UNION TO OFFER ADEQUATE PROTECTION TO REFUGEE WOMEN

ABSTRACT

The majority of refugee and migrant women who are travelling to Europe to seek asylum in the European Union are coming from war-torn countries in order to seek asylum from war or gender-based violence. This is due to the fact that women and children are often targets during war. They may be victims of forced marriages, forced abortions, genital mutilation, gender-based violence, sexual gender-based, rape and murder.

Furthermore, these crimes are taking place on refugee routes leading into the European Union and in informal camps within the Union. These informal camps grow rapidly and the refugee populations always outgrow the availability of resources. As a result men and women cannot be housed separately thereby putting women at risk of gender-based violence, sexual harassment and rape.

The dilemma therefore faced by refugee women is two-fold; the 1951 Refugee Convention does not mention gender as grounds upon which women can seek asylum meaning women who have suffered persecution and violence on the basis of their womanhood cannot qualify for refugee status and international protection. Secondly, the unsafe conditions of camps and some reception centres in Europe which exposes women to further forms of violence serves to compound their suffering and trauma and also amounts to further violations of their rights. Although EU Member States are aware of these matters, not much practical action has been taken to ensure safety and protection for refugee women.

Chapter One

1 Introduction

This research focuses on women refugees and migrants. It identifies them as a vulnerable group with special needs that render them in need of special protection. Furthermore, it focuses on the European refugee and migrant ‘crises’ and on how the European Union and its Member States have failed to adequately meet the protection needs of women refugees and migrants insofar as the European Union has failed to guarantee them adequate living conditions in camps and in some reception centres; as well as failing to offer a significant number of refugee and migrant women access to resources that would allow them to enjoy basic rights such as dignity, bodily integrity, freedom of movement and equality as per international and European Union laws.

1.1 Terminology

In the course of this research the term ‘refugee’ shall be used as per the definition established in Article 1 of the 1951 United Nation Convention Relating to the Status of Refugees.¹ According to this definition a refugee is a person who, ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, is unwilling to avail himself to of the protection of that country’.² The term refugee shall also be used loosely to mean a person who is seeking refuge. Using the term interchangeably in this manner will not affect the outcomes of the research.

The term ‘migrant’ shall be used as per the definition offered by the United Nations High Commissioner for Refugees, which recognises a migrant as a person who has chosen to move from their home country, not because of direct threat of persecution or death but with the intention of improving their life economically, educationally, by reuniting with their family or any other reason.³ If a migrant opts to return to their home country they will receive the

¹ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (In force April 22, 1954).

² Article 1 of the 1951 Refugee Convention.

³ UNHCR Viewpoint ‘Refugee’ or ‘migrant’- Which is right? 11 July 2016 available <http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> accessed on 27 April 2017.

protection of their government. This is unlike the position of the refugee who cannot safely return home.⁴

In this research, the term ‘refugee and migrant women’ will be used to classify women who are seeking asylum as per the 1951 Refugee Convention definition, women who are seeking refuge but who fear persecution that does not fall within the 1951 Refugee Convention definition and women who have chosen to leave their country to improve their lives not due to persecution.

The term asylum seeker refers to a person who has applied for refugee status and is awaiting the outcome of their application.⁵ In this research it shall also be used interchangeably to refer to a person who intends to apply for asylum. The interchangeable use of this term will not affect the outcomes of the research.

With regards to the term vulnerable, it is often defined contextually. Therefore, there are not many academic sources that define or clearly set out the parameters of what vulnerability in the case of women refugees, migrants and asylum seekers would be. In the South African Constitutional Court case of *Union of Refugee Women and Others v Director, Private Security Industry Registry Authority* refugees were identified as being vulnerable, among other personal disadvantages, because of the fact of having found themselves outside their country because of circumstances that they are unable to ‘control’.⁶ Furthermore JC Hathaway who is quoted in this case, identified refugees as being a group of people who experienced ‘a special vulnerability’ on the basis of being coerced by violence of potentially life-threatening degrees to flee from their countries and are additionally traumatised by the experience of having to try and resettle in a ‘foreign country’.⁷

However, what was noted during the research is that both psychologists and criminologists have shied away from offering a general or specific definition of the term vulnerable since vulnerability is circumstance specific. J Birkmann supports this where he points out the fact that there is no ‘universal definition of vulnerability, [and that] various disciplines have developed their own definitions and pre-analytic visions of what vulnerability

⁴ Ibid.

⁵ ‘Asylum-seeker’ Cambridge Advanced Learner’s Dictionary (2008) 3rd ed. Cambridge. Cambridge University Press.

⁶ *Union of Refugee Women and Others v Director, Private Security Industry Registry Authority* 2007 (4) SA 395 (CC) 28.

⁷ Ibid at 28-29.

means.⁸ Therefore, the circumstances that would make a person vulnerable depend on the context that the individual finds themselves.

Vulnerability will be influenced by factors such as gender and age and further by external features such as socio-economic dynamics, socio-cultural dynamics, the environment, political affairs and institutional dynamics.⁹ Furthermore, WC Clarke defines vulnerability as the risk that human beings will be exposed to as a result of negative outcomes due to changes in climate, the environment and social conditions.¹⁰ Finally and according to the International Federation of Red Cross and Red Crescent Societies, vulnerability is ‘the diminished capacity of an individual or group to anticipate, cope with, resist and recover from the effect of natural, human-induced or human-made disaster or conflict.’¹¹

With regards to women refugees and migrants, the first two causal factors that create vulnerability are their displacement and the lack of adequate state protection from the host nation. The International Committee of the Red Cross notes that women who have fled war or conflict are a vulnerable group because war is a contributor to vulnerability.¹² Furthermore, if the government of a host country is not committed to the protection of refugee and asylum seeking women it will be revealed in the manner in which factors that contribute to the risk of their physical and mental well-being are controlled and consequences prevented. Such factors include but are not limited to provision of separate housing for men and women, access to health facilities, assistance during the asylum application procedure and access to counselling for women who may have experienced abuse and trauma.

The definitions found in case law are quite similar in that they are formulated per the circumstances. They maintain that a person who has experienced disadvantage and harm may be unable to protect themselves adequately if they are continually faced with such circumstances. *R. v Waveney DC Ex parte Bowers* is a case dealing with an applicant who the

⁸ J Birkmann *Indicators and Criteria. Measuring Vulnerability to Natural Hazards: Towards disaster resilient societies* (2006) 11.

⁹ International Federation of Red Cross and Red Crescent Societies ‘What is vulnerability’ n.d. available on www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-vulnerability/ accessed on 15 June 2018.

¹⁰ WC Clarke, J Jager & R Corell ‘Assessing vulnerability to Global Environmental Risks, Report of the Workshop on Vulnerability to Global Environmental Change: Challenges for Research, Assessment and Decision Making’ 22 - 25 May 2000, available at <http://www.ksg.harvard.edu/sust> accessed on 15 June 2018.

¹¹ International Federation of Red Cross and Red Crescent Societies op cit (n9).

¹² International Committee of the Red Cross ‘Women in war: a particularly vulnerable group?’ 1 March 2007, available at <https://www.icrc.org/eng/resources/documents/feature/2007/women-vulnerability-010307.htm> accessed on 15 June 2018.

Waveney City Council would not give housing although he had suffered an injury to his head.¹³ In this case the court tasked itself with defining the word ‘vulnerable’ and establishing what gives rise to vulnerability. It found the word vulnerable in this context to refer to a person whose ability to defend themselves from harm was decreased whereas if a ‘less vulnerable man’ was put in the same situation he would be able to cope.¹⁴ In *R. v Uddin*, the term is defined in a clinical context to refer to a person who is not able to defend themselves from ‘violence, abuse or neglect’ and is further disadvantaged by other factors that may include age or illness.¹⁵

This paper therefore defines the state of vulnerability of refugee and migrant women as the state of being exposed to any degree of physical, psychological, sexual, mental and economic harm in their host nation – with little to no prospects of securing safety and without adequate recourse to justice, that diminishes their capacity to deal with situations of disadvantage and harm.¹⁶

The words ‘adequate’ and ‘protection’ will be used as per their usual denotations which are ‘enough or satisfactory for a particular purpose’ and ‘keeping safe from harm or injury’ accordingly.¹⁷ Therefore, adequate protection for the purposes of this paper shall be taken to mean, satisfactorily keeping safe from harm or injury. Satisfactorily is not a high standard but rather a basic or minimum standard. According to the United Nations High Commissioner for Refugees, when countries do not protect or offer adequate protection to persons seeking refuge, such persons are likely to be exposed to intolerable situations in which their basic rights, security and lives are in danger.¹⁸

2 Aim of the thesis

The aim of this thesis is to uncover some of the abuses and violations refugee and migrant women are experiencing as a result of migrating to Europe in search of international protection and asylum. In doing so, this thesis further aims to demonstrate how the European Union and its Member States have failed to provide adequate protection to refugee and migrant women.

¹³ *R. v Waveney District Council ex parte Bowers* (1983) Q.B. 238.

¹⁴ *Ibid.*

¹⁵ *R. v Uddin* (Tohel) (2017) 7 WULK 641 (CA Criminal Division). This was a case that was discussing adult vulnerability in the clinical sense. This paper extracts from the usefulness of the wording in the definition.

¹⁶ Own definition which has been made context specific to refugee and migrant women.

¹⁷ Cambridge Advanced Learner’s Dictionary (2008) 3rd ed. Cambridge. Cambridge University Press.

¹⁸ UNHCR ‘Protection’ n.d., available at <http://www.unhcr.org/protection.html> accessed on 15 June 2018.

This will be done by examining the extent of the international and regional obligations of the European Union to refugees and migrants who are women.

2.1 Research context

In 2015 it is estimated that about one million people arrived in the European Union. This massive number of arrivals has been described as one of the largest refugee influxes into Europe ever since World War II.¹⁹ The 2015 arrivals were marked by a number of people who were in search of either international protection or economic emancipation.²⁰ The highest numbers of arrivals in 2015 were (in order of the highest to lowest) from Syria, Albania, Eritrea, Kosovo, Iraq, Serbia and Afghanistan.²¹

In order to reach Europe refugees and migrants usually arrive using sea-routes.²² In 2015 the three major sea-routes were the East Mediterranean sea-route leading to Greece, the Central Mediterranean route leading to Italy and the West Balkans route, situated near Croatia and Hungary.²³ Overnight, these entry point States were forced to accommodate unusually high numbers of refugees in accordance with the European Union's Dublin III Regulation²⁴. According to this Regulation, refugees and migrants are supposed to begin their asylum application procedure in the Member State that they first arrive in.²⁵ The aim of the Regulation is to maintain the same asylum standard across all the European Union Member States.²⁶ In doing so the Regulation also seeks to prevent refugees and migrants moving from State to State in search of better asylum deals.²⁷ By default this means that Greece, Hungary and Italy would end up with greater numbers of refugees and undocumented migrants.

¹⁹ European Parliament 'European Union migrant crises: facts and figures' 30 June 2017, available at www.europarl.europa.eu/news/society accessed on 15 June 2018.

²⁰ Ibid.

²¹ European Asylum Support Office 'Annual Report on the Situation of Asylum in the European Union 2015' (2016) available at <https://www.easo.europa.eu/information-analysis/annual-report2> accessed on 20 June 2018.

²² Frontex Risk Analysis Unit 'Risk Analysis for 2016' (2016) available at http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf accessed on 20 June 2018 at 15.

²³ Ibid.

²⁴ Dublin III Regulation (European Union) No 604/2013 of the European Parliament and of the Council of 26 June 2013. OJL 180.

²⁵ European Asylum Support Office 'An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis' 7 August 2016, available at [doi:10.2847/695557](https://doi.org/10.2847/695557) accessed on 22 June 2018 at 7.

²⁶ Ibid.

²⁷ J Freedman 'Women's Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?' (2008) *Hum R Rev* available at [doi 10.1007/s12142-008-0059-1](https://doi.org/10.1007/s12142-008-0059-1) accessed on 20 June 2018 at 426.

As these countries failed to keep up with the large numbers of refugees and migrants; as well as failing under the pressure of the numerous arrivals to satisfy the demands of the Dublin III Regulation, many refugees and migrants began to move to more asylum friendly Member States such as Germany and France who too became overwhelmed with the large numbers of arrivals and applicants of those seeking international protection.²⁸ Later that year gunmen and suicide bombers carried out a string of attacks that left over 100 people dead in France in attacks known as the ‘Paris attacks.’²⁹ This intensified insecurity among European Union citizens with regards to the influx of refugees especially those of Muslim tradition and forced the European Union into clamping down on refugee arrivals.

The European Union had to act quickly and decide on a resolution that would serve both the European Union and refugees. The European Union was unable to reach a unified decision and ended up splitting into two groups.³⁰ The first group consisted of the Western European Member States and was led by Chancellor Angela Merkel of Germany and was supported by France and Italy among other States. This group supported the passing of a policy known as the European Union Agenda on Migration.³¹ This policy sought to better standardise the common European asylum system to ensure that all Member States assist in burden sharing and to improve legal and regular migration.³² The second group was the Visegrad Group and it consisted of Hungary, Poland, Slovakia and the Czech Republic. This group was against the European Union Agenda on Migration especially the policy’s agenda on burden sharing that would see refugees and migrants being evenly distributed among the Member States.³³ The policy passed successfully although it was met with resistance by the Visegrad Member States.³⁴

In a further bid to resolve and reduce the flow of irregular migration into the European Union, the European Union and Turkey entered into an agreement known as the EU-Turkey deal in March 2016. The purpose of this deal was to shut-down all irregular routes into Europe

²⁸ B Chappell ‘Germany, France Announce Plans to Welcome Thousands of Migrants’ 7 September 2015 *The Two-Way*, available at <https://www.npr.org> accessed on 23 June 2018.

²⁹ M Ray ‘Paris attacks of 2015’ *Britannica*, available at <https://www.britannica.com/event/Paris-attacks-of-2015> accessed on 23 June 2018.

³⁰ I Toyg & B Benvenuti ‘The European Response to the Refugee Crises: Angela Merkel on the move *IPC-Mercator Policy Brief*, June 2016, available at <https://ipc.sabanciuniv.edu> accessed on 23 June 2018 at 2.

³¹ *Ibid* at 2.

³² *Ibid* at 2-3.

³³ *Ibid*.

³⁴ *Ibid*.

in order to reduce irregular migration, smuggling of refugees into Europe and deaths at sea.³⁵ Refugees and migrants coming into Europe via sea routes would now be required to enter via Greece where they would have to remain until they had been reassigned to another Member State.³⁶ However, every refugee and migrant who had arrived in Greece from Turkey irregularly would be sent back to Turkey.³⁷

As a result large numbers of people started accumulating on the Greek islands and temporary camps became packed over their capacity.³⁸ Greek authorities were (and are still) not coping with the high numbers in arrivals and applications and consequently, they began experiencing severe backlogs.³⁹

As a result, many people ended up waiting for periods extending over one or two years for their first or second interview with no end to the waiting in sight.⁴⁰ While people were waiting for their interviews or to have their applications processed, more people were arriving on a daily basis.⁴¹ This resulted in the camps and reception areas in Greece becoming intensely overcrowded.⁴²

The overcrowding and undue delays in the processing of applications resulted in a situation in which Greek authorities, even with the assistance of non-governmental organisations (NGOs) were failing to meet the high asylum demands.⁴³ It also meant that resources were in short supply, living space was extremely limited and therefore refugees and migrants found themselves living in dire conditions. The extremities of these living conditions are said to trigger mental illnesses that are worsened by the stress or trauma refugees and migrants may be carrying from fleeing persecution.⁴⁴ Due to the overcrowding in one camp in

³⁵ European Council 'European Union -Turkey Statement' 18 March 2016 available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed on 28 June 2018.

³⁶ Ibid.

³⁷ Ibid.

³⁸ A Miller 'Nowhere to go: Refugees Fear Closure of Greek Camp that has river of sewage and a 12-hour wait for meals' *The Intercept*, 9 October 2018, accessed at <https://refugeeobservatory.aegean.gr/en/nowhere-go-refugees-fear-closure-greek-camps-has-river-sewage-and-12-hour-waits-meals> accessed on 20 December 2018.

³⁹ Ibid.

⁴⁰ Medecin Sans Frontiere 'Trapped in Moira' *Medecin Sans Frontiere*, 19 July 2018, available at <https://www.msf.org/trapped-moira> accessed on 10 December 2018.

⁴¹ Miller op cit (n 35).

⁴² OS Kotsiou, P Kotsios & DS Srivastava 'Impact of the Refugee Crises on the Greek Health Care System: A long road to Ithaca' (2018) 15 *Int'l J Environ Res Pub Health* 1790 available at <https://www.mdpi.com/pdf> accessed on 17 December 2018 at 4.

⁴³ Ibid.

⁴⁴ Medecin Sans Frontiere 'Trapped in Moira' op cit (n40).

Lesbos in Greece, raw sewage runs between the tents as the toilets are outnumbered by the occupants of the camp.⁴⁵ It is further reported that people are having to wait in queues for food for between five to twelve hours for a single meal.⁴⁶

As was discussed above situations of crisis diminish the capacity of an individual to defend themselves from harm or disadvantage and thereby increases their vulnerability.⁴⁷ Women and children are disproportionately affected by war, disasters as well as social and economic crises.⁴⁸ Therefore refugee and migrant women are at a greater risk of harm, disadvantage and violence while living in these conditions of transit in Greece.

According to the United Nations High Commissioner for Refugees, during the process of forced migration and while they are seeking refuge, women become exposed to a variety of disadvantages and therefore end up with special problems which generate special needs.⁴⁹ In contrast, while men and boys who have been forcibly displaced may be exposed to the same problems as women – women can be expected to suffer more on the basis of their gender and owing to their legal and cultural status as well as to their socio-economic positioning.⁵⁰ This means that in contrast to men and boys, women are less likely able to enjoy the same protection as well as being less likely to get opportunities to exercise their rights.⁵¹

2.1.1 The refugee and migrant ‘crises’

While an influx in the migration of refugees and migrants was recorded in 2015, it is worth clarifying that this paper does not agree with the influx being referred to as a ‘refugee crises’ as it vilifies, criminalises and others refugees and migrants; many of whom fled to Europe in 2015 for justifiable reasons and in search of international protection. In lieu of referring to a refugee crises, this paper shall rather make reference to the 2015 European Union refugee influx or the refugee influx from hereon.

2.1.2 Why 2015?

⁴⁵ Miller op cit (n 41).

⁴⁶ Ibid.

⁴⁷ See (n16).

⁴⁸ Ibid.

⁴⁹ UNHCR ‘Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis - Greece and the former Yugoslav Republic of Macedonia’ 20 January 2016, available at <https://unhcr.org/569f8f419.pdf> accessed on 20 June 2018.

⁵⁰ D Simonovic, ‘Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions’ (2014) 36 *Hum Rts Q* at 590.

⁵¹ Ibid at 591.

N Banulesai-Bogdan and S Fratzke attribute the mass influx to ongoing violence and instability in the countries of origin such as Syria, Afghanistan and Iraq.⁵² Further, they attribute the mass arrivals to the problem of deteriorating conditions in the countries of first asylum such as Turkey, Jordan and Lebanon which are the more popular countries that refugees and migrants from Syria, Afghanistan and Iraq often flee too due to proximity.⁵³ The European Asylum Support Office explains this point further by noting that the ever-worsening conditions in camps as well as the desire for improved social and economic prospects drive asylum seekers out of Turkey and Lebanon and towards Europe.⁵⁴ They also discuss what they call the ‘pull-factor’, which are the positive outcomes that encourage other refugees and migrants to brave the journey to Europe because they become aware of favourable policies such as the European Union Agenda on Migration, as well as hearing stories of other refugees and migrants who are successfully reconciled to their families.⁵⁵ Furthermore, the media plays a huge role in the distribution of images, videos and stories of successful migrations and better living conditions that not only inspire refugees to flee from their countries of origin but to also endure the dangers, risks, abuses and overall toughness of the journey from home and throughout Europe.⁵⁶

2.1.3 How women are affected

This research will focus on how women refugees stand to suffer during this crisis because of certain failures of the European Union. From the onset it should be clarified that European Union Member States are not responsible for the refugee crises but they have not managed to handle it in a way that reflects the integrity of European community and that affords dignity to women.

The challenges that are experienced by women refugees and migrants are associated with their gender, as women, as well as their position as refugees and migrants in society. As a group and in comparison to men and boys, women will most likely not have access to basic rights and are at greater risk of exposure to violent treatment and discrimination which are

⁵² N Banulesai-Bogdan and S Fratzke ‘Europe’s migration crises in context’ *Migration Policy Institute*, 24 September 2015, available at <https://migrationpolicy.org/artcile/europe's-migration-crises-in-context-why-now-and-what-next> accessed on 12 June 2018.

⁵³ European Asylum Support Office ‘The push and pull factors of asylum-related migration’ (2016), available at <https://www.easo.europa.eu/publications> accessed on 14 July 2018.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

worsened in situations of war or displacement.⁵⁷ The European Union should therefore be expected to offer international protection that includes gender sensitive policies and practices in order to ensure that women too, are afforded the opportunity to enjoy international protection.

2.1.4 Ways in which the European Union has failed to provide adequate protection to women

Despite the fact that not all European Union Member States are in support of offering generous protection to refugees and migrants, the European Union as a whole ought to be commended for the strides it has taken in the short time since the beginning of the European Union refugee influx to offer international protection.⁵⁸ In issue is not the lack of protection but the lack of adequate protection for women. The vulnerability of refugee women has been mentioned briefly above but it has also been identified by the United Nations High Commissioner for Refugees and United Nations Women's Refugee Commission.⁵⁹

Women who are refugees and migrants are therefore in need of international protection that is gender sensitive. For example, while a shelter such as a tent or container performs the basic functions of keeping out the elements and will be regarded as being adequate shelter, adequate shelter for refugee and migrant women will not only block out the elements but it will also separate women from men.⁶⁰ This should be done in order to reduce the risk of women being sexual harassed or violated. This means that what is accepted as being adequate protection may need to be further reviewed in order to ensure that it accommodates the protection needs of women.

Some of the ways that have been identified in which the European Union has failed to adequately meet the protection needs of women include; failure to adequately investigate and deal with matters of gender based violence in reception camps, failure to meet the European Union's Common European Asylum System Directives that require women to be interviewed

⁵⁷ J Freedman 'Violence: a barrier to sexual and reproductive health and rights' (2018) 24 *Reproductive Health Matters* 47 available at <https://www.jstor.org/stable/10.2307/26495887> accessed on 12 July 2018 at 20.

⁵⁸ UNHCR 'Working with European Institutions' n.d., available at <https://unhcr.org/working-with-the-european-institutions.html> accessed on 15 November 2018.

⁵⁹ Women's Refugee Commission 'The EU-Turkey Agreement fails women and girls' (2016) available at <https://www.womensrefugeecommission.org/rights/resources1357-eu-turkey-agreement> accessed on 15 January 2019.

⁶⁰ UN Women 'Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union' (2017) *United Nations Entity for Gender Equality and the empowerment of Women* accessed at <https://eca.unwomen.org/en/digital-library/publications2017/03/report-on-the-legal-rights-of-women-and-girl-asylum-seekers-in-the-european-union#view> accessed on 20 June 2018.

by women and without their families being present, failure to provide women with necessary information during their asylum interviews– which often results in women making poorly informed decisions that disadvantage them and failure to provide safe, separate accommodation and sanitation for women in camps in order to reduce the opportunities and instances of them experiencing physical and sexual violence. Finally, the EU-Turkey Agreement fails women by creating conditions that make it impossible to access or enjoy their right to asylum which include arbitrary and indefinite detention, possibility of refoulement and being kept in Turkey.⁶¹

3 Problem statement

Information gathered from the United Nations Women’s Refugee Commission, the United Nations High Commissioner for Refugees as well as the media brings to light the fact that Member States of the European Union have failed to provide basic and adequate protection to women refugees and migrants.⁶² Unless change is introduced immediately, refugee women entering reception centres and camps in the European Union are entering danger hotspots where they are guaranteed to experience at least one of a number of violations based on the fact that they are refugees and further based on the fact that they are women.

This failure to provide basic and adequate protection to refugee and migrant women must be condemned as a violation of basic human rights, refugee rights and women’s human rights. The consequences of failing to provide adequate protection leaves an already vulnerable group exposed to further vulnerability and violence in the form of physical, psychological even sexual violence.

The failure to deal adequately with the influx has left thousands of women refugees and migrants as the victims of either degradingly poor access to basic protection in the form of inadequate shelter or housing; in which women are being housed in crowded tents, containers,

⁶¹ Jesuit ‘The EU-Turkey Deal: Analysis and Considerations, Jesuit Refugee Service Europe Policy Discussion Paper’ April 2016 available at https://jrseurope.org/publication/assets/publication/file/jrs_europe_eu_turkey_dealpolicy_analysis_2016-04-30.pdf accessed on 16 December 2018.

⁶² UNHCR ‘Refugee women and children face heightened risk of sexual violence amid tension and overcrowding at facilities on Greek islands’ 9 February 2018, available at <https://www.unhcr.org/news/briefing/2018/2/5s7d67c4/b/refugee-women-children-face-heightened-risk-sexual-violence-amid-tension.html> accessed on 12 December 2018 and also Women’s Refugee Commission op cit (n59) 1.

rundown buildings or in the open air.⁶³ Added to this, is the failure to adequately provide medical care, sanitation facilities, food, running water, documentation and legal assistance.⁶⁴

According to a case study done by A Bonewit on the reception of female refugees and asylum seekers in Germany one of the effects of overcrowding at reception centres is the spread of disease.⁶⁵ The Asylum Seekers Benefit Act only allows sick migrants and asylum seekers to receive medical attention if they are in severe pain or the disease is serious.⁶⁶ On the issue of poor health care lack of adequate professional health care leaves prospective mothers at the risk of complications that may arise during birth that may put both mother and child at risk of losing their lives. Furthermore, lack of food in reception centres means that many breastfeeding women are, along with their infants at risk of malnourishment.⁶⁷

Finally, failure of Member States to provide separate sleeping facilities for women makes them the targets of physical violations and sexual assault. Added to this, in some reception centres women do not have their own sanitation and bathing facilities.⁶⁸ As a matter of ensuring bodily integrity and safety it is imperative that the bathing facilities for women be placed closer to their residences and be designed in a manner that affords privacy and dignity. It is reported that in some centres and camps that during the night women face the risk of sexual assault as they walk in long dark corridors to access toilets.

4 Significance and purpose

The significance and purpose of this study is to put emphasis on the fact that women asylum seekers, migrants and refugees are deserving of better protection while they seek refuge in the European Union. The women that this research focuses on are mainly from war torn countries where they have fled unspeakable violence which includes sexual violence, gender-based violence and gender based persecution.⁶⁹ Having been displaced, they seek safety and

⁶³ Aljazeera 'Greece to ease overcrowding in Lesbos refugee camp' *Aljazeera*, 18 September 2018, available at <https://www.aljazeera.com/amp/news/2018/09/greece-ease-overcrowding-lebos-refugee-180918181232295.html> accessed on 10 December 2018.

⁶⁴ Ibid.

⁶⁵ A Bonewit 'Reception of female refugees and asylum seekers in the European Union Case study Germany' (2016), accessed at <http://www.europarl.europa.eu/supporting-analyses> accessed on 24 February 2018 at 22.

⁶⁶ Asylum Seekers' Benefit Act, article 4 2000 EC.

⁶⁷ Bonewit op cit (n65) 24.

⁶⁸ Aljazeera 'Greece to ease overcrowding in Lesbos refugee camp' op cit (n57).

⁶⁹ G Robbers 'Sexual Violence Against Refugee Women On The Move To And Within Europe' (2016) available at https://www.researchgate.net/publication/12252633_Sexual_Violence_Against_Refugee_Women accessed on 10 November 2018.

protection in foreign countries but as this research shall identify they are instead met with hostility and confronted by different kinds of human rights violations with no recourse to justice. This research also rejects the treatment of migrants, refugees and asylum seekers as second class citizens.

At present, existing research does not provide a comprehensive or specific definition of the term ‘second class citizen’. Again this is a term that is best defined contextually. This paper therefore relied on the definition offered by the dictionary which defines a second class citizen as a person who faces systematic discrimination on the basis of their social or political grouping.⁷⁰ Such persons will often be denied opportunities and will be treated as if their rights are inferior to a resident of that jurisdiction. This is the way in which refugee and migrant seeking women are being treated in the European Union camps in Greece.⁷¹

While this paper appreciates the steps that are taken before an individual is granted asylum or refugee status, and that not all applicants will be granted asylum or refugee status, it argues that there is no need for host nations in the European Union to treat asylum seekers as a nuisance, threat or as less deserving of protection of their rights than European Union citizens. Refugees are not second class citizens and if anything the delicacy of their social circumstances warrants rigorous protection of their rights – especially for women.

5 Literature review

In this paper, reference shall be made to the work of JC Hathaway who explains the delicate relationship between the State and the rights to access of refugees. States seem to be hesitant to offer full protection to refugees, which often leaves thousands of people who are in need of international protection in destitution.⁷² JI Goldenziel highlights a further problem in international law which is the fact that of all the people who find themselves as survivors of displacement for various reasons, only those who fit the 1951 Refugee Convention definition of a refugee qualify to apply for asylum leaving hundreds of thousands of people without protection.⁷³ Hathaway believes that the interest of states in refugee law only goes as far as it benefits them.⁷⁴ He explains this further by pointing out that European States established

⁷⁰ Second Class Citizen. Definition found at <https://www.collindictionary.com> accessed on 15 June 2018.

⁷¹ Women’s Refugee Commission op cit (n59) see generally.

⁷² JC Hathaway ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harv Int’l L J* 129 at 136.

⁷³ JI Goldenziel ‘The Curse of the Nation-State: Refugees, Migration, and Security in International Law’ *Arizona State Law Journal* and see 1951 Refugee Convention op cit note 1.

⁷⁴ Hathaway op cit (n 72) 136.

methods of control to curb the entry of migrants who they deemed ‘less desirable’ in order to benefit fully from admitting into their States, migrants who were skilled and could work in their markets and assist their economies to thrive.⁷⁵ In this way international protection of refugees was no longer about offering protection to people in need but about capitalising on immigration. International immigration become about admitting people who could add ‘economic value’.⁷⁶ He therefore concludes that refugee law is more concerned with protecting the interests of powerful states.⁷⁷ He supports this by noting that the 1951 Refugee Convention ‘defines need’ in way that excludes many people who may be in need, thereby echoing Goldenziel’s sentiments.⁷⁸ He further notes that the 1951 refugee Convention perpetuates the continued rejection of ‘comprehensive assistance for all involuntarily displaced’ people in favour of ‘strategic limitations’ that are ‘determined by political objectives.’⁷⁹

Two issues stand out here, the first being the fact that refugee rights are painted as not being a priority to states which begs one to consider the second issues which is whether states can be required to improve on their standards of treatment of refugee. Guy S. Goodwin-Gill⁸⁰ believes that one of the reasons why refugee rights law is not a priority is because refugee law remains on the fringes when it comes to international protection of human rights.⁸¹ Furthermore he notes that States perceive themselves as being ‘guardians’ of human rights, but only the human rights of their citizens.⁸² This often leaves refugees in the shadows.

A look at the reports of refugee treatment in Europe reveal mistreatment and abuse of their rights that is happening in Lesbos, Greece as a result of the European Union -Turkey deal. The deal was signed in 2016 as a means to control irregular migration and to ‘manage the refugee crises’ of by shutting down the illegal sea routes into Europe which would ultimately see fewer refugees crossing into Europe. Finally, with the closure of dangerous and ‘irregular routes’, new and safer routes were promised but to date these have not yet been opened. The irregular routes were said to be dangerous especially for women who ran the risk of being

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ JC Hathaway ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4 *J of Ref Stud* 2 113 at 113-114.

⁷⁸ Ibid at 114 and see Goldenziel op cit (n73).

⁷⁹ Hathaway op cit (n 77) at 114.

⁸⁰ GS Goodwin-Gill ‘International Law and Human Rights: Trends Concerning International Migrants and Refugees’ (1989) 23 *Int’l Mig Rev* 3 at 526.

⁸¹ Ibid.

⁸² Ibid.

trafficked or forced to pay for their trips with sex. According to Freedman smugglers are also accused of sexually abusing women and of treating them violently.⁸³ While the European Union envisioned that closure of irregular routes would put a curb on the exploitative business of smugglers, Freedman believes that those closures may actually put women at higher risk of sexual exploitation and sexual violence as the risk of smugglers to enter into European waters via new routes may demand even higher prices.⁸⁴

According to Bonewit, these are not the only abuses that women are experiencing.⁸⁵ She and Freedman both report in their separate writing that in reception centres and camps, women are getting sexually abused due to unsafe living conditions, they are going without food and water, they do not have toilets and showers and they are also having to wait unusually long periods during their asylum applications. Women are reportedly living in tents, rundown buildings and some are even escaping to live in fields for safety. Women are also being held in detention centres under the same poor conditions.

United Nation Special Rapporteur on Violence against Women Rashida Manjoo points out that when refugee and migrant women enter the 'transnational' realm they become vulnerable and insecure and both she and Wendy Young agree that this insecurity and vulnerability put refugee and migrant women at a higher risk of physical and sexual violence with no recourse to justice.⁸⁶ Being a woman refugee puts a woman in a special position of political disadvantage especially in the asylum system where, according to J Freedman, she stands to be treated as a hostile and non-credible applicant of asylum.⁸⁷

This means that refugee women coming to apply for asylum under the 1951 Refugee Convention who are finding themselves trapped in Greece are not only faced with a violation of their rights as per their rights as per the Refugee Convention but they are also having to be screened in an asylum system that already views them through discriminatory lens thereby

⁸³ Freedman op cit (n57) 54.

⁸⁴ Ibid.

⁸⁵ Bonewit op cit (n65) see generally for the full discussion of the abuses women experience in reception centres.

⁸⁶ R Manjoo 'The Continuum of Violence against Women and the Challenges of Effective Redress' (2002) 1 *Int'l Hum R L Rev* 1 at 2 and WA Young 'The Protection of Refugee Women and Children - Litmus Test for International Regime Success' (2002) 3 *Geo. J. Int'l Aff* 37 at 39.

⁸⁷ Freedman op cit (n27) 54.

infringing on their rights as per the Convention on the Elimination of all forms of Discrimination Against Women.⁸⁸

One of the more serious forms of violence against refugee women that the European Union has not tackled openly or at all, is the issue of rape of refugee women travelling to Europe or within Europe and especially in Greek and Turkish camps.⁸⁹ When one considers the gravity of rape as it has been used as a weapon of war as is discussed by Deborah Anker, Special Rapporteur Rashida Manjoo and Catherine MacKinnon, it becomes very concerning that the issue of rape of refugee women has not been dealt with as a priority matter by the European Union.

6 Research Methodology

This research makes use of the qualitative research method. The qualitative method interprets and seeks to understand social behaviours and interactions.⁹⁰ This study is therefore focused on a specifically selected group which has already been outlined as refugee and migrant women seeking asylum in the European Union. The research focuses on the ongoing European Union refugee influx and as result will at times refer to material from news websites and NGO websites where the academic literature does not yield any current information.

7 Chapter synopsis

As has been outlined in the aim of this chapter, this paper seeks to outline the failures of the European Union in offering protection to refugee and migrant seeking women. In order to do so the following investigations shall be done: in chapter two, this paper will look at whether state sovereignty takes precedence over refugee rights in order to determine whether the European Union can be called upon to improve the standards of protection for refugee women.

The third chapter will consider the international and regional obligations of the European Union to offer adequate protection to the European Union. In this chapter, this paper will consider whether the crises in Greece and whether the European Union is legally bound to intervene as part of its regional and international obligations towards refugee women. In this chapter the importance of asylum as a human right will be stressed.

⁸⁸ Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979 (entry into force: 3 September 1981).

⁸⁹ UNHCR op cit (n62).

⁹⁰ K Hammarberg 'Qualitative research methods: when to use them' *Oxford Academic* 2016 accessed at <https://academic.oup.com> accessed on 2 May 2018.

The forth chapter of this paper will offer a critical analysis of the abuses that refugee and migrant women face in the European Union. This will be done by looking at the European Union -Turkey Agreement and considering whether this agreement was a political move to keep refugees out of the European Union or whether it actually is an agreement that is meant to serve and save the lives of refugees. Many women are at risk of refoulement as a result of this agreement. Further this chapter will investigate what a 'safe country' is and whether Turkey is a 'safe country' by international standards.

The fifth and final chapter will contain a conclusion of the findings of this paper.

8 Conclusion of chapter

In conclusion the stance that shall be adopted by this research paper will be to reject the failure of European Union host nations to offer adequate protection to refugee and migrant women. These failures amount to degradation of their human rights, refugee rights and women's human rights. The exact number of women that are exposed to this treatment is not known but the official statistics assume that it may be close to 200 000 or more. Since these are only recorded statistics according to the number of asylum-seekers who applied for asylum for the first time in 2015, the actual number may be far higher.

Chapter Two

State sovereignty versus human rights: What should take precedence?

1 Introduction

This work is an investigation on how the European Union has failed to adequately protect the rights of refugee and migrant women. It must be stressed that the European Union has not failed to protect these women but they have failed to do so adequately. Before outlining the ways in which the European Union has failed to provide refugee and migrant women with adequate protection, it is imperative to resolve the issues of the competing rights of the sovereign State and of refugee women. This shall be done by investigating whether the sovereign States of the European Union can and should be obliged to improve on the protection they are currently offering to refugee women or whether asking them to go beyond what they are already providing would in any way be an infringement of the autonomy and sovereignty of their States.

2 The European Union⁹¹

The formation of the European Union began in 1950 in order to build solidarity and harmony among European nations by bringing a permanent end to interstate conflict following World War II.⁹² It was initially known as the European Economic Community and its first members were Belgium, Germany, France, Italy, Luxembourg and the Netherlands.⁹³ The European Economic Community was established as a result of the 1957 Treaty of Rome.⁹⁴ Apart from establishing the EEC the Treaty of Rome established a unified market that would allow the ‘free movement of goods, labour, services and capital’ among the Member States of the European Economic Community.⁹⁵ In 1973 Denmark, Ireland and the United Kingdom joined the European Economic Community. In 1981 Greece claimed its membership and in 1985 Portugal and Spain also become members.⁹⁶ In 1995 Austria, Finland and Sweden joined while

⁹¹ The EU should not be confused with the European Council which is a council made up of 47 European States.

⁹² Europa ‘The History of the European Union’ n.d., available at https://europa.eu/european-union/about-eu/history_en accessed on 15 November 2018.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Eur-lex ‘Treaty of Rome (EEC)’ n.d., available at <https://www.eur-lex.europa.eu/legal-content/EN/TXT/?URI=LEGISSUM%3Axy0023> accessed on 15 November 2018.

⁹⁶ Europa op cit (n92).

the year 2000 saw ten new States claim membership. Bulgaria and Romania joined in 2007 and in 2013 Croatia became the latest member to the European Union.⁹⁷

The European Union is now comprised of 28 autonomous and sovereign Member States whose main obligations include but are not limited to the promotion of peace, security, freedom of their citizens, free movement and trade, promotion of socio-economic unity among its among Member States and the establishment of the Euro as the common currency.⁹⁸ The European Union's policies with regards to refugees and migrants are enshrined within the CEAS wherein European Union Member States are required to commit to ensuring common asylum and 'minimum standards' of reception for people seeking international protection.⁹⁹

While the situation with regards to the treatment of refugees in Europe is changing rapidly, sometimes for the better and sometimes for the worst, at the time of the writing of this paper, the European Union was engaged in offering some level of protection to refugees.¹⁰⁰ However, the protection being offered by the European Union is being criticised by this paper as being inadequate. This is, *inter alia*, due to the establishment of refugee camps in Greece, many which have become unfit for human accommodation.¹⁰¹ Camps such as Moira have become deplorable, degrading and dangerous. Greek and Turkish camps where refugees and migrants are being warehoused, expose women to sexual abuse and violence.¹⁰² Refugee and migrant women in the European Union are at risk of being put in detention by Member States who use detention arbitrarily to 'contain' the movement of refugees.¹⁰³ Another contributing factor to the poor treatment of refugee women has been the EU-Turkey Agreement which puts refugee women at risk of being denied asylum and of being sent back the countries they have fled.¹⁰⁴

⁹⁷ Ibid

⁹⁸ Europa 'The EU in brief' n.d., available at https://europa.eu/european-union/about-eu/eu-in-brief_en accessed on 15 November 2018.

⁹⁹ Open Society Foundations 'Understanding migration and asylum in the European Union' June 2018, available at <https://www.opensocietyfoundations.org/explainers/understanding-migration-and-asylum-european-union> accessed on 15 November 2018.

¹⁰⁰ UNHCR 'Working with European Institutions' n.d., available at <https://unhcr.org/working-with-the-european-institutions.html> accessed on 15 November 2018.

¹⁰¹ Miller *op cit* n(38).

¹⁰² Oxfam International 'vulnerable and abandoned' 9 January 2019 available at <https://www.oxfam.org/en/vulnerable-and-abandoned> accessed on 15 January 2019.

¹⁰³ UNHCR 'UNHCR deeply concerned by Hungary plans to detain asylum seekers' 7 March 2017 available at <https://www.unhcr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plans-detain-asylum-seekers.html> accessed on 15 January 2019.

¹⁰⁴ Women's Refugee Commission *op cit* (n59) 28.

The investigation of this chapter is to therefore test whether a sovereign State can be asked to do more in terms of providing international protection to refugee and migrant women or, whether requiring a sovereign State to do more is actually an infringement on its right to sovereignty. This chapter will therefore look at the delicate complexity that exists between State sovereignty and the protection and maintenance of refugee rights.

2.1 State sovereignty and human rights

State sovereignty is a notion in which States have the absolute right and the power to govern and control their affairs as they wish.¹⁰⁵ State sovereignty also means that all States view each other as equals and that ‘no State has the right to interfere with the internal affairs of another State.’¹⁰⁶

Human rights are the fundamental entitlements that are due to all people regardless of their racial, national, ethnic, religious or other status.¹⁰⁷ Human rights make all people equal as they are inherent to all humans, that is, all humans are born with rights. Since human rights make everyone equal; they impose a negative duty on all people to refrain from behaving in a manner that would curtail a person’s ability to enjoy their rights.¹⁰⁸ For example, the right to life imposes a duty on all people not to murder others, while the right to freedom imposes a duty on all people not to enslave or arbitrarily detain others.¹⁰⁹

Similarly, in order for people to be able to enjoy their human rights, State powers’ need to be limited. International human rights law limits the absolute powers of States by requiring ‘[g]overnments to act in a certain way or to refrain from certain acts, in order to promote...human rights.’¹¹⁰ However, the very act of curtailing a State’s full powers and control has been criticised as an infringement of the rights of States to exercise their autonomy and sovereignty.¹¹¹

2.2 Statehood, sovereignty and rights

¹⁰⁵ The Levin Institute ‘The issue of sovereignty’ *Globalization101*, (2016) available at www.globalization101.org/the-issue-of-sovereignty/ accessed on 5 January 2019.

¹⁰⁶ Ibid.

¹⁰⁷ United Nations ‘Human Rights’ n.d., available at www.un.org/en/sections/issues-depth/human-rights/ accessed on 5 January 2019.

¹⁰⁸ MG Singer ‘Negative and positive duties’ (1965) 15 *The Philosophy Quart* 59, available at <https://www.jstor.org/stable/2218209> accessed on 5 January 2019 at 98.

¹⁰⁹ United Nations op cit (n107).

¹¹⁰ Ibid.

¹¹¹ KD Stephend *Sovereignty: Organised hypocrisy* (1999) 20-22.

According to J Dugard, an entity is a State if its population is stable, if it has a clear territory, if it has a government and finally, if it is able to enter into agreements with other States.¹¹² Additionally, observance of human rights has begun to take precedence as a modern day requirement of a State, and States that wish to enjoy recognition in the international community must also demonstrate human rights protection.¹¹³ This is supported by the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union issued in 1991 and extended to Yugoslavia which desired to make recognition of States reliant on complying with international law regulations and requirements with regards to upholding human rights and protecting minorities.¹¹⁴ To this James Hathaway adds that States' observance of international human rights, their guaranteeing of the fundamental needs of citizens and their pooling of resources within the international community are the basic limitations on State autonomy that States must be willing to accept if they are to be recognised as being legitimate in the international community.¹¹⁵

The notions sovereignty has, according to Penelope Matthews 'evolved [over the centuries] from the notion of the absolute power of princes over their subjects to include notions of territorial integrity and equality of States.'¹¹⁶

A sovereign State is therefore one that is independent and has the power to govern itself and its affairs in a manner that is free from the interference of other States and powerful intergovernmental organisations such as the United Nations.¹¹⁷ The independence enjoyed by States emerges from their right to non-interference from other States and is one of the ways in which States maintain internal power and control over their citizens and resources.¹¹⁸ For this reason, States are very zealous when it comes to defending their autonomy.

According to BG Carruthers, autonomy is the ability of a State to freely regulate its affairs.¹¹⁹ The more autonomous a State is, the more power, control, authority and influence it

¹¹² J Dugard *International law and South African Perspective* 3ed (2000) 81.

¹¹³ Ibid.

¹¹⁴ Declaration on the guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union adopted by the European Council on 16 December 1991.

¹¹⁵ Hathaway op cit (n77) 113.

¹¹⁶ P Mathew 'Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia' (1994) 15 *Aust YBIL* 35 at 45.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ BG Carruthers 'When is the State autonomous? Culture, Organisation Theory and Political Sociology of the State' (1994) 12 *Soc Theory* 1 available at <https://www.jstor.org/stable/202033> accessed on 5 January 2019.

is assumed to have. Additionally, autonomy matters when it comes to international relations as it gives States negotiating and bargaining power.¹²⁰ The more autonomous a State appears to be, the more likely it is that such a State has a stable economy– thereby making it more desirable to other States for the sake of establishing investments and forming bilateral and multilateral agreements.¹²¹

State sovereignty and the right to autonomy in the international community are therefore not attributes that States take lightly as their very nature of being depends on their right to self-regulation and the ability to act independently from the governance of other States.¹²²

2.3 The tensions that exist between human rights and sovereignty

As has been demonstrated above, the main characteristic of State sovereignty is the autonomy of the State and its power to regulate its own affairs free from interference from other States.¹²³

However and with the passage of time, the world has been shrinking into a global community in which State sovereignty is no longer understood as absolute State supremacy and absolute State independence.¹²⁴ In order for States to thrive in this global community, they need to be willing to share their resources as well as be willing to enter into bilateral and multilateral relations with other States which would require State sovereignty and its exercise to be limited.¹²⁵ International human rights law and international refugee law also call for States to participate in responsibility sharing in order to ensure effective humanitarian protection.¹²⁶ This cannot be achieved in the face of absolute sovereignty but within the confines of a more relaxed notion of State sovereignty that allows States to be independent as well as interdependent for commercial, humanitarian and political purposes.

Human rights protection and State sovereignty exist in a sometimes complimentary sometimes antagonistic relationship. The tension exists, for example, in a situation where a State that is acting within the scope of its interests, is required to refrain from such actions, where those actions infringe on the human rights of their citizens. The matter that Krasner

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Matthews op cit (n116) at 45.

¹²³ Ibid at p 47.

¹²⁴ Ibid

¹²⁵ Ibid.

¹²⁶ Ibid.

Stephend takes issue with is that, international human rights and international refugee law imposes obligations on sovereign States in a way that is not aligned with the principle of sovereignty in as far as autonomy and self-regulation is concerned.¹²⁷ For Stephend, the exertion of outside influence on domestic laws and policies is a simple violation of sovereignty.¹²⁸ He believes that the principle of sovereignty is eroded when the outside world has the power to determine how a State should organise its structures of authority.¹²⁹ Further, Krasner gives the example of a State using the Universal Declaration of Human Rights to influence its policies and how this amounts to external pressure, external interference and an infringement of that State's sovereignty, in so far as that the of legislation changes that State's view on an issue.¹³⁰

The protection being offered to refugee and migrant women by the European Union has come into question following continued reports from non-governmental organisations such as Amnesty International, Women's Refugee Commission, UN Women as well as from the media outlets such as the Guardian and Times Live.¹³¹ The claims of these reports are that while refugee women are being offered protection in the European Union, this protection is inadequate as it does not properly account for the specific needs of women.¹³² As a result refugee women continue to be exposed to abuse, neglect and violence even within designated spaces of safety such as reception centres.¹³³ Therefore and with regards to State sovereignty, can European Union Member States be expected to do more in terms of upholding the human rights of women refugees and migrants?

Principles of Statehood require States to protect their citizens from the threat of external harm as well as from the threat of internal harm.¹³⁴ Where a country is in a state of emergency due to war, famine or severe economic hardships, international human rights makes provision for citizens from such countries to seek refuge and asylum in other countries.¹³⁵ However and

¹²⁷ KD Stephead op cit (n21) 20-22.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ UNHCR op cit (n62), also Women's Refugee Commission op cit (n59) 1, also Kumi Naidoo 'Another winter of discontent on the Greek islands' *Amnesty International* 30 November 2018 available at <https://www.amnesty.org/en/latest/news/2018/11/another-winter-of-discomfort-on-the-greek-islands/> accessed on 10 December 2018.

¹³² Ibid.

¹³³ Robbers op cit (n69).

¹³⁴ Dugard op cit (n112) 81.

¹³⁵ Ibid.

in light of this, refugees are often received and treated as unwelcome economic burdens rather than being seen as victims who are fleeing critical situations where their lives, livelihoods and families were endangered.¹³⁶ Most States are hostile towards receiving refugees for reasons varying from xenophobia to national budget constraints.¹³⁷

When it comes to the enforcement and application of refugee rights, there seems to be a lack of zeal among States to enforce effective protection for refugees. With regards to effective protection, women refugees and migrants have a special need for their rights to freedom, security, movement, bodily integrity and for the right to seek asylum in other countries, to be protected.¹³⁸ However, and according to Goodwin-Gill, sovereignty is one of the principles States hide behind in their denial and dilution of refugee rights.¹³⁹ He notes further that States see themselves as the wardens of human rights, but usually only the human rights of their citizens.¹⁴⁰ For this reason, he believes that refugees and migrants are often on the fringes of effective rights protection.¹⁴¹

Despite an understanding that refugee and migrant women are deserving of the abovementioned rights, it would seem that they continue to receive the short-end of the stick when it comes to receiving protection from States, thereby echoing Goodwin-Gills sentiments that refugee and migrants remain on the fringes of international protection.¹⁴²

A look at the development of refugee rights reveals that refugee protection has not always been a priority to States thereby contributing to the modern day phenomenon in which scholars and NGO's repeatedly have to ask for refugee protection to be made a priority by States.¹⁴³ According to Hathaway, refugee law was designed by wealthier States in order to protect themselves and their interests.¹⁴⁴ Essentially refugee law represented a tension between States seeking to exercise control over their territories and refugees who had been forced to migrate to more economically stable States in search for humanitarian protection.¹⁴⁵ Refugee

¹³⁶ R Parsons 'Refugees: Economic Burden or Opportunity?' 2016 available at <https://www.researchgate.net/publication/297324238> accessed on 15 November 2018.

¹³⁷ H Solomon & H Kosaka 'Xenophobia in South Africa: Reflections, Narratives and Recommendations' 2 *South'n Af Peace and Sec St* 2 at 7.

¹³⁸ Ibid.

¹³⁹ Goodwin-Gill op cit (n80) 526.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Hathaway op cit (n 129) 136.

¹⁴⁵ Hathaway (n72) 136.

law was therefore designed in such a way as to protect the self-interest of States, hence the gaping loopholes that sometimes leave refugees exposed to undue suffering over and above the hardships they are forced to deal with as a result of the nature of the refugee journey.

A study of the 1951 Refugee Convention drafting further reveals the intention of States to prioritise themselves over the welfare of refugees. Added to this and as pointed out by Hathaway, a number of States refused to accept provisions that sought to offer protection to all asylum-seekers.¹⁴⁶ Furthermore, a number of States refused to accept a universalistic approach to the application of refugee law in favour of a method that required ‘burden sharing’ and defined ‘need’ in a manner that forced a significant number of refugees from poor countries to be excluded.¹⁴⁷

At present one would find that refugee law is not accessible to most people who are forced into flight as asylum seeking processes are determined in a manner that reflects national interest. Furthermore, this leaves refugees and migrants in a position where they are forced to receive whatever kind of assistance they are offered to them. This is taking place due to the fact that States prioritise their national interests over the protection needs of refugees. Additionally, refugee law is least accessible to women refugees who face difficulty due to a lack of knowledge on the part of adjudicators on the complexities surrounding the lives of refugee women and their individual cases.¹⁴⁸

3 Do refugee women have the ‘right’ to have their rights protected in the European Union?

There are four key instruments that can be consulted with regards to the treatment and presence of asylum seekers in the European Union. These are; the 1951 Refugee Convention¹⁴⁹, the European Union *acquis communautaire*, the European Convention on Fundamental Human Rights and the UN Convention against torture and other cruel, inhuman or degrading treatment of punishment. Refugee and migrant women are also protected by the Convention on the Elimination of all forms of Discrimination Against Women.¹⁵⁰

¹⁴⁶ Ibid.

¹⁴⁷ Hathaway *op cit* (n72) 145.

¹⁴⁸ Heaven Crawley ‘Gender, persecution and the concept of politics in the asylum determination process’ (2000) 9 *FMR* 4 at 1.

¹⁴⁹ Ibid.

¹⁵⁰ Council of Europe ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ amended by Protocols 11 and 14. 4 November 1950, ETS 5, UN General Assembly, Convention Against Torture

3.1 1951 Refugee Convention

The 1951 Refugee Convention is the primary legislation in international law that deals specifically with the protection of refugees and asylum seekers.¹⁵¹ Apart from securing the right to asylum, it offers and protects other fundamental rights that allow asylum seekers to rebuild their lives in their host nations.¹⁵² It must be noted that the 1951 Refugee Convention was drafted in order to assist people who were fleeing and seeking asylum in the specific context of World War II.¹⁵³ This means that a number of asylum seekers today may be denied from enjoying its protection. Essentially, its effectiveness has been retained and it remains applicable to people who fall within the scope of its ambit as is outlined in Article 1.¹⁵⁴

However, a large number of people who have fled their countries in fear of persecution and in need of protection do not fall within this scope and may struggle to attain its protection. Certain types of refugee and migrant women are examples of those who have fled because they fear persecution or they have been persecuted but will not fall neatly within the definitional scope because the crimes they are fleeing are persecution crimes that are unique to women such as rape, forced marriages, female genital mutilation, honour killings, sexual slavery, intimate partner gender based violence and sexual gender based violence.¹⁵⁵ These crimes are all cruel, constitute torture or punishment, are degrading and are inhuman.

3.2 European Union *acquis communautaire*

The European Union *acquis communautaire* or the European Union laws, are the ‘common rights and obligations that are binding on all European Union countries’ and are made up of legislation, judgments, declarations and regulations.¹⁵⁶ Regulations pertaining to refugees and asylum seekers can be found in the Common European Asylum System. The Common

and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UN General Assembly, Convention on the Elimination of all forms of Discrimination Against Women, 18 December 1979.

¹⁵¹ UNHCR ‘The 1951 Refugee Convention’ n.d., available at <https://unhcr.org/1951-refugee-convention.html> accessed on 20 January 2019.

¹⁵² For example the welfare rights as enshrined in Articles 20-4 of the 1951 Refugee Convention. Op cit note 1.

¹⁵³ DW ‘Refugee Convention of 1951 still crucial cornerstone of human rights’ 28 July 2016 available at <https://m.dw.com/en/refugee-convention-of-1951-still-cornerstone-of-human-rights/a-19429093> accessed on 20 January 2019.

¹⁵⁴ Op cit note 1.

¹⁵⁵ United Nations Women’s International League of Peace and Freedom ‘Violence against women information’ *Peace Women* available at <https://www.peacewomen.org/resources/violence-against-women-information> accessed on 20 December 2018.

¹⁵⁶ Eur-lex ‘Glossary of Summaries’ n.d., available at <https://www.eur-lex.europa.eu/sumamry/glossary/aquis.html> accessed on 12 December 2019.

European Asylum System in conjunction with the European Convention on Fundamental Human Rights tries to cover the gaps that were not foreseen in the 1951 Refugee Convention especially with regards to the treatment and reception of refugee and migrant women.

3.3 The European Convention on Fundamental Human Rights

The European Convention on Fundamental Human Rights is an international human rights protection instrument that protects the fundamental ‘civil and political’ rights of all people living in Europe.¹⁵⁷ It was established in 1950 at the end of World War II to ‘ensure that Governments would never again be allowed to dehumanise and abuse people’s rights.’¹⁵⁸ Although, the Convention does not discuss the matter of asylum in its text, Nuala Mole and Catherine Meredith point out that in the absence of ‘express provisions’ dealing with asylum in the Convention, a ‘substantial body of jurisprudence has emerged [the Convention] between 1989 and 2009 [and it] sets the standard for asylum seekers across Europe.’¹⁵⁹

In having to expressly deal with the question of whether the Convention applies to asylum seekers, the European Court of Human Rights has repeatedly reiterated, as they did in *Soering v The United Kingdom* that no such provision as pertaining to asylum seekers was made in the Convention.¹⁶⁰ However in *Soering v The United Kingdom* the court acknowledged the applicability of Article 3 of the Convention on the basis that ‘it would be incompatible with the common heritage of political traditions, ideal, freedom and rule of law [if the member States to the Convention were to] knowingly surrender a person to another State’ where that person was at risk of being treated cruelly, inhumanly, degradingly, tortured or punished¹⁶¹

Based on this discussion, refugee and migrant women can seek asylum in the European Union within the support of these legislative frameworks. Their existence demonstrates a commitment by the European Union to strive towards protecting refugee and migrant women. However, the question remains whether European Union Member States can be required to improve the protection they offer refugee and migrant women on the basis that the protection they are offering is in some circumstances leaving women exposed to violations of their rights

¹⁵⁷ Amnesty International ‘What is the European Convention on Human Rights?’ 21 August 2018 available at <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> accessed on 15 January 2019.

¹⁵⁸ Ibid.

¹⁵⁹ N Mole & C Meredith *Asylum and the European Convention on Human Rights* (2010) Council of Europe at 19.

¹⁶⁰ *Soering v The United Kingdom* application 14038/88. 7 July 1989 at 88.

¹⁶¹ Article 3 of the European Convention on Fundamental Human Rights is the prohibition on torture, cruel, inhuman, degrading treatment or punishment.

to equality, freedom of movement, bodily integrity and the right to seek asylum in many cases as shall be outlined in the discussion further and below.

4 Sovereignty: the right of states

4.1 Background

A good example to highlight the practical tension that exists between the granting of human rights and State sovereignty are the on-going disputes in the Dominican Republic in which the State takes issue with recognising Dominican children of Haitian decent as Dominican citizens if their birth does not fall under certain legal parameters. The Dominican Republic refuses to change their policies stating that to do so would be a threat to their sovereignty.¹⁶²

In the case of *Yean and Bosico*, the Dominican government refused to issue birth certificates to two girls of Haitian decent who were born in the Dominican Republic and whose mothers were also in the Dominican Republic.¹⁶³ As a result the girls would not be able to register for school among other consequences.¹⁶⁴ Their mothers sued the government of the Dominican Republic on the basis of race based discrimination and denial to the right of nationality. The government eventually issued the birth certificates but did not address the issue of racism and denial to the right of nationality.¹⁶⁵

The Dominican Republic refuses to recognise Dominicans of Haitian decent on the basis of on-going unrest between the States of Haiti and the Dominican Republic.¹⁶⁶ In October 2014 the Inter-Americas Court found that the Dominican Republic was in violation of ‘arbitrarily denying thousands of Dominicans of Haitian decent their nationality.’¹⁶⁷ The response from the President’s office was that they rejected the court’s decision on the basis that it was a violation of the ‘Dominican sovereignty’ and further that it was ‘an affront to national sovereignty’.¹⁶⁸

¹⁶² Amnesty International ‘National Sovereignty vs human rights’ 2014 available at <https://www.amnesty.org/latest/campaigns/2014/11/national-soverignty-vs-human-rights/> accessed on 5 January 2019.

¹⁶³ *Case of the Yean v Bosico Children v The Dominican Republic* Inter-American Court of Human Rights (IACrHR) 2005.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Amnesty International op cit note (n162).

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

Herein lies an example of the typical tension that exists where a sovereign State refuses to agree to certain policies on the basis that they would be an infringement to State sovereignty but where there are clear abuses of human rights.

4.2 Closer to home: The Visegrad States

Although its legality is in question, the EU-Turkey Agreement is an agreement which compels all European Union Member States to agree to a quota system of responsibility-sharing in order to make sure that the responsibility of helping asylum seekers coming into Europe does not fall primarily on the shoulders of a few European Union States.¹⁶⁹ The EU-Turkey Agreement shall be discussed at greater length in chapter four but for present purposes it shall suffice to point out that all Member States of the European Union are required to consent to the Agreement; even if they do not stand by it.

The Visegrad States are four European Union Member States that have been very clear with regards to their resistance to the quota system of burden sharing of asylum seekers coming into the European Union.¹⁷⁰ They believe that refugees and migrants should be assisted from where they are coming from, that is, from Jordan, Lebanon or Turkey to ensure that they do not need to come to the European Union to seek asylum.¹⁷¹ The European Commission has already threatened to ‘sue Poland, Hungary and the Czech Republic’ on account of their refusal to assist asylum seekers.¹⁷² On 19 July 2018 the European Commission released a press Statement in which they disclosed the intention to ‘refer Hungary to the Court of Justice of the European Union for non-compliance of its asylum and return legislation with EU law.’¹⁷³

The Polish Prime Minister Mateusz Morawiecki clearly stated that ‘[h]ere in Poland, it is we who decide who will come to Poland and who will not. Proposals by the European Union that impose quotas on us hit the very foundations of national sovereignty... In this matter our

¹⁶⁹ P Stepper ‘The Visegrad Group and the EU agenda on migration: A coalition of the unwilling?’ (2016) 1 *Corvinus J. Int’l Affairs* 1 at 73.

¹⁷⁰ *Ibid* at 73.

¹⁷¹ *Ibid*.

¹⁷² Euronews ‘Poland refuses Middle Eastern migrants’ 2 January 2018, available at <https://google.com/amp/www.euronews.com/amp/2018/01/02/poland-refuses-mid-east-migrants> accessed on 5 January 2018.

¹⁷³ European Commission ‘Press Release- Migration and Asylum: Commission takes further steps in infringement procedures against Hungary’ Brussels, 19 July 2018, available at www.europa.eu/rapid/press-release_IP-18-4522_en.htm accessed on 5 January 2019.

sovereignty is fundamental for us.’¹⁷⁴ The Hungarian Prime Minister Mr Viktor Orban also pointed out that ‘...we cannot help anyone if we destroy our country in the meantime.’¹⁷⁵

In light of the European Union refugee plight, and bearing in mind that a number of refugees coming to Europe are coming from the war-torn States of Syria, Iraq and Afghanistan; is the European Union’s insistence that its Member States participate as equally as possible in responsibility-sharing, in order to guarantee the human rights of asylum seekers, an infringement on State sovereignty or is it a justifiable limitation? In addition, and as was stated at the beginning, would it be an infringement on the State sovereignty of European Union member States to require them to offer the kind of protection that covers the needs of asylum seeking women?

By way of example, women in refugee camps are offered accommodation but they have to share this accommodation with men.¹⁷⁶ This increases their risks of experiencing sexual violence.¹⁷⁷ For example, an Oxfam report from January 2019 reveals that some refugee women testified that they were sleeping with diapers as they feared going to the toilets at night.¹⁷⁸ Refugee women are therefore in need of separate accommodation to guarantee their protection and safety. Furthermore Alice Edwards points out that women who are victims of crimes of torture such as rape need to be resettled as soon as possible as living in camps aggravates the deterioration of their mental health and hinders their healing process.¹⁷⁹ The European Union would therefore be required to be rigorous in the process of identifying victims and would need to put in place mechanisms to assist and resettle such women accordingly, if such a women would so wish. According to Freedman although the Common European Asylum System has been clear that asylum determination staff need to be vigilant in order to identify vulnerable persons, and although Frontex guards are trained to identify vulnerable persons, there is no clear guideline on what exactly to do next when a person has been identified

¹⁷⁴ H Gavin “‘We will decide who will enter our countries!’ Hungary and Poland reject EU refugee quotas’ *Express* 15 May 2018 available at <https://www.google.com/amp/s/www.express.co.uk/news/world/960125/eu-news-hungary-poland-oppose-european-union-refugee-quota-Viktor-Orban-Morawiecki/amp> accessed on 5 January 2018.

¹⁷⁵ Ibid.

¹⁷⁶ UNHCR op cit (n62).

¹⁷⁷ Bonewit op cit (n65).

¹⁷⁸ Oxfam op cit (n102).

¹⁷⁹ A Edwards ‘Resettlement: A valuable tool in protecting refugee, internally displaced and trafficked women and girls’ (2001) *FMR* at 31.

as vulnerable.¹⁸⁰ She notes a testimony from Berlin in which it was stated, ““There is no real security for asylum-seeking women because whenever they are attacked, either physically or sexually harassed, nobody knows what to do. There is no clear policy.””¹⁸¹

In order to answer the above question, this paper will engage in a limitations test as per the European Convention on Fundamental Human Rights, German law and as was discussed in the South African case of *S v Makwanyane*.¹⁸²

4.3 Infringement or justifiable limitation

Requiring a State to do more than what it is willing or prepared to do can be treated by that State as an infringement of its sovereignty as was shown using the example of the Dominican Republic and the Visegrad States above. However, with an estimated 2 million refugees and migrants living in the EU of which 400 000 are estimated to be women, prioritising State sovereignty may come at a very high risk which may be unjustifiable in terms of international law and human rights protections standards.¹⁸³

In order to establish whether prioritising the protection needs of refugee women is a justifiable limitation to the rights of sovereignty of the Visegrad States, this paper shall apply the limitations test as it was used in the South African case of *S v Makwanyane*.

4.3.1 Limitation of rights

Section 36 of the South African Constitution is a limitations clause that ‘limits all the rights in the [South African] Bill of rights in terms of a law of general application’, further, all ‘limitations must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’¹⁸⁴ Therefore before a right can be limited, the limitation must first be found to be ‘reasonable and justifiable in an open and democratic society’. In order to do so, a court ‘must engage in a balancing exercise and arrive at a global judgment on

¹⁸⁰ Freedman op cit (n57) at 21 and Reception Conditions Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (applicable from 21 July 2015) Art 2(k), Art 10, Art 11, Art 17, Art 18(3) and especially Chapter Four dealing with ‘Provisions of Vulnerable Persons’. Further, the Qualification Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 OJ L 337/9-337/26; Art 1(36) and Art 20(3).

¹⁸¹ Ibid at 22.

¹⁸² *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

¹⁸³ MS Dionis, M Timar & A Domscheit-Berg ‘Protecting refugee women and girls from violence: A collection of good practices’ *World Future Council* (2016) available at <https://www.worldfuturecouncil.org> accessed on 5 December 2018

¹⁸⁴ Section 36 of the South African Constitution.

proportionality.’¹⁸⁵ Similarly, in Germany, in order for rights to be limited, there needs ‘to be a constitutionally valid reason’ and further that ‘any restriction...has to be proportional to the rank and importance of the right at stake’.¹⁸⁶ The European Convention on Fundamental Human Rights adheres to the same principle of proportionality and the balancing of rights when deciding to limit rights as was discussed in *Soering*.¹⁸⁷ Additionally, the South African Constitution offers some factors that can be considered when looking at whether the limiting rights are reasonable and justifiable and these are ‘the nature of the right, the importance and purpose of the limitation, the extent of the limitation, the relation between the limitation and the purpose and [whether] less restrictive means can be used.’¹⁸⁸

In answering whether or not the refugee rights of women can reasonably and justifiably limit a State’s right to sovereignty, the answer will be positive on the grounds that in an open and democratic society as well as in the international community, the right to asylum is a fundamental human right, especially for women; and whether a woman is granted asylum or not, may be the difference between life and death for many people. The extent to which this right would limit State sovereignty may perhaps be social or political of which the social reasons for restricting refugees and migrants entry into Europe are sometimes embedded in Islamophobic and xenophobic attitudes.¹⁸⁹ Other EU Member States have expressed security concerns as their reasons for wanting to deny refugees into their territory of which the European Court of Human Rights has already ruled in *Saadi v Italy* that national security will not be balanced against the right to not be expelled from a host nation.¹⁹⁰

Therefore, the right to asylum for women will require extra measures to be put in place in order to ensure that women can enjoy their asylum rights. These measures need not be extravagant but may be as basic as ensuring that in the Greek and Turkish camps men and women are housed separately and that measures to identify and assist vulnerable women are revised and practised as well.

¹⁸⁵ *S v Manamela and Another (Director General of Justice intervening)* 2000 (3) SA 1 (CC) at 31-22.

¹⁸⁶ D Grim ‘A Comparative Perspective. Human Rights and a Judicial Review in Germany’ (1994) *HRJ*.

¹⁸⁷ *Soering* supra (n160).

¹⁸⁸ Section 36 of the South African Constitution.

¹⁸⁹ Middle east Eye ‘Muslims in Europe facing “facing hostility in everyday life”, Isalmophobia study finds’ *Middle East Eye* 26 September 2018 available at <https://www.middleeasteye.net/news/muslims-europe-facing-hostility-everyday-life-islamophobia-study-finds> accessed on 20 January 2019.

¹⁹⁰ *Saadi v Italy*, application 37201/6. 28 February 2008 at 120-122.

An acknowledgement of the fact that by virtue of being women and refugees, refugee and migrant women are more susceptible to harm especially of the sexual kind should push European Union Member States to increase their vigilance and protection methods for refugee women. Requiring States to take such steps cannot, in a reasonable and democratic society be taken to be an unfair or unreasonable limitation to the rights of States to sovereignty.

Chapter Three

Refugee Law, Women and the legal obligations of the European Union.

1 Introduction

Asylum is an international human right.¹⁹¹ The European Union has a legal obligation towards refugee and migrant women in which they ought to ensure that all refugee and migrant women are given the opportunity to apply for asylum and if they qualify, then it must be granted to them.¹⁹² The European Union also has an international obligation to ensure that refugee and migrant women are not subjected to discrimination and violence throughout the asylum seeking process and thereafter.¹⁹³ Furthermore, they have regionally binding obligations to guarantee that men and women asylum seekers receive substantively equal treatment.¹⁹⁴ Finally, in terms of international women's rights, the European Union has an obligation to develop its asylum rules and procedures so that refugee and migrant women are included in the refugee protection agenda and are unequivocally guaranteed protection.

Since the aim of this research is to investigate how the European Union has failed to adequately protect refugee women, this chapter will be considering the European Union's legal obligations to offer protection to refugee women as well as the ways in which they have not adequately discharged their obligations. The consequences that refugee women experience as a result will also be discussed. It is imperative that the European Union be held to account if they have obligations to protect refugee women because the experience of being a refugee and a woman exposes a person to multiple disadvantages and,

“...the experience of multiple disadvantages can have a compounding and persistent effect, reinforcing barriers to getting ahead and increasing the likelihood of other related problems later in life. People who experience multiple disadvantages have poor outcomes across many dimensions. ...Multiple disadvantages can also lead to exclusion from society and a lack of access to goods, services, activities and resources.”¹⁹⁵

¹⁹¹ 1951 Refugee Convention op cit note 1.

¹⁹² Ibid.

¹⁹³ Convention on Preventing and Combating Violence Against Women and Domestic Violence, opened for signature 11 May 2011, Council of Europe, C.E.TS No. 210.

¹⁹⁴ Qualification Directive

¹⁹⁵ Victorian Council of Social Service 'Disaster and disadvantage: Social vulnerability in emergency management' (2014), VCOSS, available at <https://www.vcoss.org/au/pdf> accessed on 10 March 2018.

Therefore women, such as refugee women, who have been exposed to many kinds of disadvantages especially if they are fleeing from impoverished and war-torn countries, will often find it more challenging to overcome these difficulties in comparison to women who face single or less complex disadvantages. The right to asylum is therefore not just an opportunity to live in a new country but it is also an opportunity for refugee women to rebuild their resilience and their lives. States are obliged by the 1951 Refugee Convention to offer asylum that refugees can enjoy.¹⁹⁶ Therefore, when host nations offer protection that is inadequate they compound the already existing vulnerability and disadvantage experienced by refugee women by exposing them to further trauma that is triggered by being in continually stressful conditions.

2 Background: A brewing crises in Greece

In March 2016, the European Union and Turkey entered into an agreement most popularly known as the EU-Turkey deal.¹⁹⁷ On 18 March 2016, they released a joint statement that set out the parameters of the deal.¹⁹⁸ The purpose of the deal was to limit the number of refugees coming into Europe via illegal sea routes which, if it was successful, would limit the number of refugees coming into Europe.¹⁹⁹

The agreement has three main parts to it which are; the resettlement deal, which stipulates that for every Syrian refugee that is resettled in the European Union, one would shall be sent back to Turkey from Greece.²⁰⁰ Secondly, all refugees who came into Europe through illegal sea routes from 20 of March 2016 would be sent to Turkey. Finally, three billion euro was promised to Turkey to assist them in coping with the refugee influx they would now be faced with and an additional three billion euro would be given to them to assist in shouldering the current refugees living in Turkey.²⁰¹

2.1 Impact

Statistically, the number of refugees who arrived in Greece in 2016 dropped to about 173 000 as compared to about 857 000 who arrived in 2015. In 2017, 29 700 refugees are recorded to

¹⁹⁶ A Edwards 'Human Rights, Refugees, and The Right "To Enjoy" Asylum' (2005) 17 *Int'l J R L* 293 at 302.

¹⁹⁷ EU-Turkey Agreement op cit (n215).

¹⁹⁸ Ibid.

¹⁹⁹ K Rygiel, F Baban & S Ilcan 'The Syrian refugee crisis: The EU-Turkey "deal" and temporary protection'. (2016) 16 *Global Social Policy* 3. 315–320. Available at doi: 10.1177/1468018116666153 accessed on 10 November 2018 at 315.

²⁰⁰ EU-Turkey Agreement op cit (n215).

²⁰¹ Ibid.

have arrived in Greece.²⁰² This means that statistically and on paper, the EU-Turkey agreement was working. However, it was working at the expense of refugees.²⁰³ Despite the statistical success, refugees are living in sub-standard conditions on the Greek islands where overcrowding, insecurity and even food is scarce.²⁰⁴ Further, the Greek islands have the capacity to host 9000 people but are currently hosting close to 14 000.²⁰⁵

Due to the problem of overcrowding on the Greek islands, the asylum procedure has been reported to be extremely slow which is further compounding the crowding issue.²⁰⁶ Article 33(1) of the Asylum Procedures Directive stipulates that ‘the examination procedure’ is completed ‘within six months.’²⁰⁷ However, according to a report from the Asylum Information Database, applications procedures in Greece were going on for as long as year.²⁰⁸

Overcrowding has also resulted in food shortages and it has been reported that people can queue for food for anything between five and twelve hours as well as reports that some people end up going without food for a number of days.²⁰⁹ Furthermore, African refugees face discrimination and are sometimes commanded to join the backs of queues; sometimes the food runs out before everyone has received some.²¹⁰ Mothers who breastfeeding and are suffering from malnutrition are living in anxiety as formula for babies is not always available.²¹¹

Reports from Medecin sans Frontiers point out the ever-increasing mental health issues among the refugee population.²¹² Post-traumatic stress compounded with the psychological trauma caused by the prolonged stay in the camp has resulted in refugees suffering from

²⁰² Executive Committee for the High Commissioner’s Programme ‘Update of United Nations High Commissioner for Refugee’s operations in Europe’ 13 February 2018 available at www.unhcr.org/5a9fd8b30.pdf accessed on 20 June 2018.

²⁰³ Rygiel, Baban & Ilcan op cit note (n 199) 316.

²⁰⁴ Oxfam op cit (n179) at 8.

²⁰⁵ Marianna Karakoulaki ‘EU-Turkey deal two years after: the burden on refugee in Greece’ 11 April 2018, *Open Migration*, accessed on <https://openmigration.org/en/analyses/eu-turkey-deal-the-burden-on-refugees-in-greece/> accessed on 15 November 2018.

²⁰⁶ UNHCR op cit (n62).

²⁰⁷ Asylum Procedures Directive op cit (225).

²⁰⁸ European Council on Refugees and Exiles ‘The length of asylum procedures in Europe’ October 2016 *Asylum Information Database* available at <https://www.ecre.org/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf> accessed on 30 November 2018. At 3.

²⁰⁹ K Naidoo ‘Another winter of discontent on the Greek islands’ *Amnesty International* 30 November 2018 available at <https://www.amnesty.org/en/latest/news/2018/11/another-winter-of-discomfort-on-the-greek-islands/> accessed on 10 December 2018.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Medecin Sans Frontiere ‘Trapped in Moira’ *Medecin Sans Frontiere* 19 July 2018 available at <https://www.msf.org/trapped-moira> accessed on 10 December 2018.

psychosis and depression.²¹³ The severity of the situation has led to it being declared a ‘mental health emergency’.²¹⁴ Furthermore, and according to Medecins Sans Frontiere, the harsh living conditions on the Greek islands, constant exposure to riots and violent, and living in a state of continued anxiety at the possibility of having to be sent to Turkey all add to the mental and psychological trauma that is experienced by refugees.²¹⁵ The situation in Moira is mentally, psychologically and emotionally triggering for a number of refugees and it brings forward existing trauma which in effect causes a deterioration in their mental and psychological health.²¹⁶

The mental health of refugee and migrants is not the only component of their well-being that is at risk. They are also at risk of contracting various illness and sicknesses in the cramped and overcrowded facilities they are forced to share.²¹⁷ There are rivers of sewage flowing between tents and that this is adding to the already fraught health conditions in the camp.²¹⁸ It is reported by the MSF that for every 84 people in the Moira camp, there is a single shower and for every 72 people there is a single toilet.²¹⁹ Additionally it is reported that up to 150 people are required to share a tent.²²⁰ Moira camp was established to hold between 3100 and 3200 refugees but it is currently hosting nearly 9000 people.²²¹

Monica Costa Riba reports that overcrowding and the severe conditions at Moira are making the camps ‘dangerous for everyone’ but especially for women and children.²²² Women do not feel safe enough to leave their tents as it is too dangerous to go to the toilets or showers unaccompanied.²²³ The United Nations High Commissioner for Refugees reports that at the Moira and Vathy camps in Greece, ‘bathrooms and latrines are a no go area for women and

²¹³ Ibid.

²¹⁴ M Karakoulaki op cit (n 205)

²¹⁵ Medecin Sans Frontiere op cit (n 212).

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Aljazeera ‘Greece to ease overcrowding in Lesbos refugee camp’ *Aljazeera* 18 September 2018 available at <https://www.aljazeera.com/amp/news/2018/09/greece-ease-overcrowding-lesbos-refugee-180918181232295.html> accessed on 10 December 2018.

²¹⁹ Medecin Sans Frontiere op cite (n2 12).

²²⁰ Medecin Sans Frontiere ‘Refugees further traumatised by conditions in Greece’s Moira camp’ *Medecin Sans Frontiere* 20 July 2018 available at <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/refugees-futher-traumatized-conditions-greece-moira-camp> accessed on 10 December 2018.

²²¹ M Karakoulaki op cit (n 2050).

²²² MC Riba ‘Women face daily dangers in Greek refugee camps’ *Amnesty International* 5 October 2018 available at <https://www.amnesty.org/en/latest/campaigns/2018/10/women-daily-dangers-refugee-camps-greece/> accessed on 10 December 2018.

²²³ Ibid as well as a report from Oxfam carrying a similar report op cit n(178) at 6.

children after dark...even bathing during the day can be dangerous.’²²⁴ What compounds the feelings of unsafety is the fact that toilet areas may not have lights and the toilets and showers do not have locks.²²⁵ The United Nations High Commissioner for Refugees reports that in 2017, 622 ‘sexual and gender based violence survivors’ were recorded in Greek camps. Furthermore in ‘28 per cent of the cases reported the violence occurred after the person arrived in Greece [and] 80 per cent of survivors were female.’²²⁶ Women complain of being harassed by police and report to living in fear of rape and sexual assault. ‘We were afraid all the time. Men start fighting. We would see blood everywhere. Life in Iraq is very scary because of mafia and violence, but conditions in Moira are awful. It is a prison.’²²⁷

Furthermore, Oxfam reports that at the Moira camp, pregnant women are having to sleep in tents or on floors and that they have inadequate or no access to medical check-ups before and after their babies are born.²²⁸ Women not only complained that they were always at risk of physical and sexual attacks but also that they did not have access to medical and sexual health care.²²⁹

3 Defining ‘adequate protection’, ‘vulnerability’ and disadvantage’

Being a woman puts a person in a position of unusual disadvantage. Women, and only by virtue of being women, are perceived as being less and deserving less and are therefore subject to many kinds of discriminatory forms of violence which they experience throughout their lives.²³⁰ Women face gender-based violence because of cultural and stereotypical biases that posture men as being superior and women as being inferior.²³¹ The identity and personhood of a woman, as is with any person, is very complex and these complexities are studied by feminist scholars through the lens of intersectionality.²³²

Intersectionality refers to the intersecting point of the ‘multiple identities’ that combine to form the identity of a person. Therefore, intersectionality is a study tool used by feminist

²²⁴ UNHCR op cit (n62).

²²⁵ MC Riba op cit (n222).

²²⁶ UNHCR op cit (n62).

²²⁷ Ibid.

²²⁸ Oxfam op cit (n178) at 2.

²²⁹ Ibid at 6.

²³⁰ D Simonovic (n50) 591.

²³¹ Ibid at 594.

²³² ‘Intersectionality: A Tool for Gender and Economic Justice’ (2004) Women’s Rights and Economic Change available at https://lgbtq.unc.edu/sites/lgbtq.unc.edu/files/documents/intersectionality_en.pdf. Accessed on 15 July 2018.

scholars for social justice that views people as individuals with a plurality of identities that operate differently within power structures.²³³ The ‘multiple identities’ of a person will be comprised of their race, gender, ethnicity, religion, marital status, ability, and nationality to name a few. These ‘multiple identities’ reflect the multiple forms of discrimination that a person may be subject to or conversely, the kinds of privilege they will be exposed to.²³⁴ The kind of gender-based discrimination that a woman will be subject to increases as her intersectional values increase.

Since discrimination is a doorway for disadvantage, feminists study intersectionality in order to understand how the system of patriarchy, the system of racism and the system of classicism work together to create systems of inequality that oppress women.²³⁵ By way of example, the intersectional values of a woman who is a Syrian refugee might be; Syrian, woman, unmarried, Muslim and undocumented refugee. If she has a disability or if she is pregnant another layer of disadvantage and discrimination can be added to her experiences.²³⁶

Womanhood is not a homogenous experience and neither is the experience of being a refugee. Applying a blanket system to asylum seekers is not a conscious way of giving international protection as women who have gender-specific needs may have their needs overlooked. International rights protection that does not reflect sensitivity and knowledge of this is bound to fail in offering comprehensive protection to refugee women.

3.1 Adequate protection

As was mentioned in the introductory chapter, the words ‘adequate’ and ‘protection’ shall be used as per their common meanings.²³⁷ The word adequate means ‘enough or satisfactory for a certain purpose’, while protection means ‘keeping safe from harm or injury’.²³⁸ Adequate protection in this paper refers to satisfactorily keeping refugee women safe from harm. On the reverse, inadequate protection is protection that exposes women to harm or that does not protect them from harm.²³⁹ Also and as was mentioned in chapter one, ‘satisfactorily’ is not a high standard but rather a minimum one. Lack of adequate protection

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Op cit 232.

²³⁷ ‘adequate protection’ op cit (n17).

²³⁸ Ibid.

²³⁹ Own definitional explanation.

for refugee women exposes them to unjust situations where their fundamental rights and lives become endangered in a space where they are seeking safety.

3.2 Vulnerability

The kind of gender-based discrimination that comes with womanhood often leaves women exposed to vulnerability.²⁴⁰ To reiterate, a group of people or a single person becomes vulnerable when their ability to cope with, anticipate, resist and recover from disaster or conflict has become diminished.²⁴¹ A person's ability to cope with, anticipate, resist and recover from disaster can become diminished when they experienced (continuous) grief, harm, injury, shock, trauma or violence, or any kind of severely negative interruption to their life.²⁴²

When a person experiences vulnerability they become exposed to disadvantage. According to the Asylum Procedures Directive, a person will experience disadvantage when their personal abilities are affected by their circumstances, and they experience a negative disruption that hinders the enjoyment of their rights.²⁴³

3.3 Disadvantage

Disadvantage encompasses a multiplicity of factors in each person's life and is therefore rooted in the complex interaction of different factors, and when some of these factors are added together they have a negative cumulative effect. Social scientists have not yet agreed on or developed a general definition for disadvantage as what makes a person disadvantaged will depend on the facts and circumstances of each case.

4 Obligations of the European Union to protect refugee women

4.1 Continued relevance of the 1951 Refugee Convention

The 1951 Refugee Convention is the primary international law instrument that sets out the parameters of who may be classified as a refugee, the rights of such individuals, and rights and obligations of the states that offer them protection.²⁴⁴ One of the main rights granted in the

²⁴⁰ Cf note D Simonovic in a discussion of article 3(d) the Istanbul Convention in 'Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions' (2014) 36 *Hum Rts Q* 590 at 600. Also see the general discussion offered by H Crawley 'Gender, persecution and the concept of politics in the asylum determination process' (2000) 9 *FMR* 4.

²⁴¹ 'Vulnerability' op cit (n17).

²⁴² Op cit (n8).

²⁴³ Article 2(d) of the Asylum Procedures Directive op cit (n225).

²⁴⁴ Op cit (n1).

1951 Refugee Convention is the right to asylum. This is the right that persons who are fleeing from harm or persecution can invoke when seeking the protection of another country.²⁴⁵ The right to asylum includes the right to not be returned to the country one is fleeing from which is enshrined in the principle of non-refoulement. According to this principle, a host nation, is prohibited from sending refugees back to the country in which they may become endangered on the basis of the five criteria which are ‘race, religion, nationality, membership of a particular social group or political opinion.’²⁴⁶

As was pointed out in chapter two, the 1951 Refugee Convention was drafted at the end of World War II to assist with European refugees.²⁴⁷ Refugee law has now since taken a new face and the grounds of persecution have increased beyond the five listed in the 1951 Refugee Convention. For this reason, those who do not fall within the five grounds set out by the Convention risk failing to qualify for its international protection. For example, the 1951 Refugee Convention does not expressly recognise gender as a grounds of persecution and therefore women who have experienced gender based persecution in the form of forced marriage, female genital mutilation, gender based violence and sexual and gender based violence, may face considerable difficulty in claiming protection.²⁴⁸ For this reason, many scholars feel that the 1951 Refugee Convention has outlived its purpose.

However, in her article, *The Enduring Relevance of the 1951 Refugee Convention*, J McAdam begins by acknowledging the criticisms levelled out against the 1951 Refugee Convention.²⁴⁹ In this article she argues in support of the importance of the Refugee Convention stating that without it a major part relating to the protection of refugees would be lost, resulting in greater numbers of displaced people having to exist in unregulated systems and spaces.²⁵⁰ By way of example, if one considers the European Union refugee influx and especially the use of irregular and unregulated sea routes, this reveals the unprecedented levels of abuse, violence

²⁴⁵ Ibid.

²⁴⁶ Article 33 of the 1951 Refugee Convention op cit (n1).

²⁴⁷ Hathaway op cit (n72) 178.

²⁴⁸ Freedman op cit (n27)

²⁴⁹ J McAdam ‘The Enduring Relevance of the 1951 Refugee Convention’ (2017) 29 *Int’l J R L* 1 see general discussion. McAdam takes note of the following criticisms against the Refugee Convention: that it is old and no longer applicable, that it is rigid and does not fully accommodate the true essence of refugee crises, that it is too wide and therefore cannot be interpreted in a way in which adequate protection can be enjoyed by refugees and that it is silent on the matter of protection.

²⁵⁰ Ibid.

and extortion that refugees become exposed to at the hands of smugglers in these spaces where there are no rules regulating safety and movement.²⁵¹

Without the Refugee Convention to offer some level of protection, guidance and regulation, abuse, extortion and violence against refugees can be expected to increase to ungovernable levels. McAdams also quotes Assistant High Commissioner for Protection Volker Turk who notes that moving away from the rules of refugee protection does not reduce the number of people seeking refuge and neither does their migration, instead it forces refugees to alternative routes which in turn results in some states being forced to (unfairly) accommodate greater numbers of refugees and migrants.²⁵² This in turn causes disagreements among states and hostility towards refugees.²⁵³

Hathaway points out that the silence of the Refugee Convention on what precise guidelines must be followed when determining refugee status is one of the features that contributes to the crippling of international protection of refugees.²⁵⁴ Added to this are the arguments of scholars who believe the Refugee Convention to be an out-dated document that can no longer cater to the refugee crises that the world is faced with today.²⁵⁵ In response to this McAdam argues in favour of the rules of treaty interpretation which serve as a reminder that the Refugee Convention cannot be read in isolation, but as per the Australian High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* the Refugee Convention should be read within the scope of the 'context, object and purpose' of the treaty.²⁵⁶ Further, McAdam does not regard the silence of the Refugee Convention on the matter of identifying who should qualify for refugee status as a failure to confront a pertinent refugee protection issues but rather takes this opportunity to stress the importance of appreciating and understanding the instrument in its entirety as a instrument that demands for asylum procedures to be conducted fairly and efficiently. Additionally and as per Goodwin-Gill, 'the absence of specific rules...does not imply the absence of specific principles'.²⁵⁷

²⁵¹ Rygiel, F Baban & S Ilcan (n199) 317.

²⁵² McAdam refers to the writing of UN Assistant High Commissioner Volker Turk in Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' (2016) 4 *Migr and Hum Sec* 45 at 47.

²⁵³ Ibid.

²⁵⁴ Hathaway op cit (72) see the discussion on pp 172/177-178.

²⁵⁵ McAdam op cit (249).

²⁵⁶ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 253 (McHugh J).

²⁵⁷ Goodwin-Gill op cit 80 and Jane McAdam op cit (n 249).

The 1951 Refugee Convention remains a very relevant document in the international protection of the rights of refugees and as United Nations High Commissioner for Refugees Assistant High Commissioner for Protection Erika Feller points out, it is only an instrument that outlines the obligations of states with regards to their obligations to refugees, and that it was not designed to be a prescriptive document.²⁵⁸ In this regards users of the Refugee Convention should be careful not to try and make the Refugee Convention say things which it did not intend to say.²⁵⁹

Both Hathaway and McAdams agree that the Refugee Convention was established following World War II. However, they disagree on the motive behind the drafting of the Refugee Convention where Hathaway sees the motivation as being one where states intended to protect themselves against the influx of refugees and McAdams argues that the motive was mainly to offer protection to refugees.²⁶⁰ However, they both agree that the failure of states to provide adequate protection to refugees is a result of the political motivation of states. Here they both cite and identify the issue as being that States tend to put themselves and their needs before the needs of refugees.²⁶¹

4.2 Convention on the Elimination of all Forms of Discrimination Against Women

The rights of refugee women are also protected by the Convention for the Elimination of all Forms of Discrimination. According to D Simonovic, the Convention is an international human rights instrument that calls for the prevention of all discrimination against women on the basis of sex and gender.²⁶² Its ultimate aim is to ensure ‘substantive equality’ among men and women.²⁶³ The Convention’s two main functions in terms of prevention of all forms of discrimination against women include its essential relevance as a tool that demands that women should be protected from every kind of ‘direct and indirect’ type of discrimination in all areas of their lives; as well as putting a demand on states to ‘adopt all appropriate measures’ in order to ensure the full advancement, development and empowerment of women.²⁶⁴ General Recommendation 32 of Convention on the Elimination of all Forms of Discrimination Against

²⁵⁸ Erika Feller *Refugee Protection and the Role of Law: Conflicting Identities: The Refugee Convention at 60, Still Fit for Purpose? Protection Tools for Protection Needs* S Kneebone, D Stevens & L Baldassar eds at 60.

²⁵⁹ Ibid.

²⁶⁰ Hathaway op cit (n 114) and McAdam op cit note (n 249) 2.

²⁶¹ Hathaway op cit (72) see the discussion on pp 172/177-178 and McAdam op cit (n 249).

²⁶² D Simonovic (n50) 591.

²⁶³ Qualification Directive op cit (n180).

²⁶⁴ Ibid at 592.

Women EXCOM states that States must include a ‘gender perspective’ in reading the grounds related to the determination of refugee status as well as using gender and sex as “grounds of persecution” when drafting state laws and policies in relation to asylum seekers.²⁶⁵

4.2.1 Direct and indirect discrimination in the European Union

With regards to State actors, the Convention on the Elimination of all Forms of Discrimination Against Women forbids states from engaging in acts that discriminate against women as well as requiring states to take positive measures to ensure that women are not treated in a discriminatory manner.²⁶⁶ Discrimination is prohibited because it ‘unfairly’ violates women’s rights to their fundamental rights of dignity, equality, freedom and even their right to seek and enjoy asylum.²⁶⁷ Discrimination in European Union law relates to either; comparisons of similar situations where there was differential treatment; or a comparison of different situations that are treated in the same way but result in unfair outcomes.²⁶⁸ Discrimination will either be direct or indirect.

The Equality Directive sets out the definitions for direct and indirect discrimination, in which direct discrimination occurs when a person is ‘treated less favourable’ because of, but not limited to, their race, ethnicity, religions, opinion and sex.²⁶⁹

In the South African case of *Osman v Minister of Safety and Security and Others* the prohibited grounds for ‘unfair discrimination’ were said to include ‘ethnicity and social origin. In this case ‘nationality’ was defined being the ‘ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature.’²⁷⁰ On the basis that the European Union Member States would never permit their own citizens to live among sewage, be separated from their families or even be exposed to mentally strenuous situations, an inference can be made that refugee and migrant women living in the sub-standard

²⁶⁵ CEDAW Executive Committee. Non-binding General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32 at 38.

²⁶⁶ Ibid.

²⁶⁷ Prohibition of discrimination of all people. Discussion taken from the introductory notes of *Hoffman v South African Airways* (1) 2000 11 SA (CC). Case concerning an HIV man who sought employment as flight attendant but was denied on the basis that he was HIV positive. This was found by the Constitutional Court of South Africa to amount to unfair discrimination.

²⁶⁸ *Sermide v Cassa Conguaglio Zuccheri* 106/83, 1984 ECR, 4209.

²⁶⁹ Equal Opportunities Directive, 2006/54/ EC 5 July 2005.

²⁷⁰ *Osman v Minister of Safety and Security and Others* WC 2008 SA. Also see section 1(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

conditions such as those in the Greek camps are being discriminated against on the basis of their social origins and status as refugees.

4.2.2 Adoption of all measures to ensure advancement and development.

Some measures that can be taken to ‘ensure the advancement and development’ of women’s rights include ‘allocation of appropriate shelter’, separating men and women, improving service conditions as well as increasing security personnel in camps, ensuring that sanitation areas are well lit and have doors that can be locked from the inside and improving on ways that survivors of sexual abuse and violence can be assisted in a way that protects their integrity and privacy.²⁷¹

4.3 Istanbul Convention

The Council of Europe Convention on Preventing and Combating Violence against women and domestic violence: Istanbul Convention, is recognised as being the first ‘legally binding’ instrument in Europe of this kind.²⁷² It has also been recognised as the most comprehensive instrument in matters of violence against women as it unequivocally states that violence against women only happens to them because they are women and that violence against women must be treated as a breach of human rights.²⁷³ Furthermore, it is praised for defining ‘violence against women’, ‘gender-based violence against women’ and ‘domestic violence’ which has not been done in an international document that is legally binding.²⁷⁴ Violence as it is understood in the Convention on the Elimination of all Forms of Discrimination Against Women General Recommendation 19, is codified, upheld developed further in the Istanbul Convention. Finally, Articles 60 and 61 of the Istanbul Convention are complementary to the 1951 Refugee Convention as they extend protection against violence to refugee women.²⁷⁵

However, the Istanbul Convention has not yet been ratified; and the European Union is encouraged to ratify it as building its principles into refugee status determinations for women

²⁷¹ UNHCR op cit (n62).

²⁷² Convention on preventing and combating violence against women and domestic violence, opened for signature 11 May 2011, Council of Europe, C.E.TS No. 210. Also see the ‘Report On The Legal Rights Of Women And Girl Asylum Seekers In The European Union’ Europe And Central Asia Regional Office United Nations Women Istanbul, Turkey, March 2017 available at <https://eca.unwomen.org/en/digital-library/publications/2017/03/report-on-the-legal-rights-of-women-and-girls-asylum-seekers-in-the-european-union&ved+2ahUKEwjpsOQi=IBBAB&usg=AOvVaw2QfZvrtiPx1M2JPgqYakD> accessed on 15 July 201 at 14.

²⁷³ Article 3 Istanbul Convention op cit (n82).

²⁷⁴ D Simonovic (n50) 603.

²⁷⁵ Report On The Legal Rights Of Women And Girl Asylum Seekers op cit (n 272).

could improve the outcomes of women's claims. Furthermore, working with an instrument that is aimed specifically at violence against women can positively contribute to the development of the common law relating women's gender based claims.

4.4 The European Union Aquis

According to the Report On The Legal Rights Of Women And Girl Asylum Seekers In The European Union.²⁷⁶ The most critical Directive with regard to the protection of refugee women is the Qualification Directive.²⁷⁷ It stipulates the parameters under which a person may be granted protection as well as stipulating the grounds upon which a person may be given secondary protection.²⁷⁸ The Qualification Directive aims at improving international law related adjudication of cases relating to asylum seekers.²⁷⁹ It also strives to ensure that asylum seekers as the beneficiaries of the protection of international law are able to access the rights that are due to them as well as ensuring that better means of integration for asylum seekers into societies within the EU.²⁸⁰

According to the Court of Justice of the European Union the Qualification Directive should be read in line with the European Union Charter of Fundamental Rights where men and women are equal before the law and discrimination is prohibited²⁸¹. Consequently, Member States of the European Union are obliged not to discriminate against refugee and migrant women as per these European Union laws.

4.4.1 Common European Asylum System

The Common European Asylum System is the European Union's shared endeavour to regulate and standardise asylum procedures within the European Union.²⁸² The number of asylum seekers coming into the European Union differs from year to year and neither is it distributed evenly among the member states. The vision of the Common European Asylum System is to therefore ensure that asylum seekers receive the same treatment regardless of which European Union member state they are applying in. The vision of the Common European Asylum System

²⁷⁶ Ibid.

²⁷⁷ Op cit (n180).

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Articles 20, 21(1) and 23 of the European Charter on Fundamental Human Rights. ETS 5 in force 3 September 1953.

²⁸² European Asylum Support Office 'An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis' 7 August 2016 available at *doi:10.2847/695557* accessed on 22 June 2018.

is that asylum seekers and refugees in all European Union member states should be treated equally and fairly.²⁸³ The Common European Asylum System is made up of different legislative frameworks as shall be discussed below.²⁸⁴

4.4.2 Common European Asylum System Directives

The Asylum Procedure Directive is mandated to ensure that the asylum application process runs with more precision, speed and efficiency among the member states as well as to ensure that vulnerable asylum seekers who may be in need of special attention as they may be disabled, elderly, ill or traumatised get the necessary support.²⁸⁵ The revised Reception Conditions Directive is mandated to ensure that, asylum seekers have access to socio-economic rights such as food, housing, health care and employment.²⁸⁶ This Directive aims at ensuring that reception conditions are standardised among European Union member states.²⁸⁷ Another key feature of the revised Reception Directive is to focus on assessing asylum seekers individually in order to ensure that special needs persons such as unaccompanied minors and people who have been tortured are identified easily.²⁸⁸ Interestingly, women have not been listed as a potential group of vulnerable persons who are deserving of individual assessments even though refugee women are at risk of gender-specific violations. Finally, the Reception Directive aims at streamlining the policies on the detention of refugees and desires that detention be used only in exceptional circumstances.²⁸⁹

The Revised Dublin Regulation standardises the asylum procedure by regulating the responsibilities of individual member states. It creates clearer deadlines for asylum procedures among member states and is said to be supposed to prevent asylum seekers from asylum shopping for the best asylum deals. However, the Dublin Regulations have been criticised by Assistant High Commissioner Volker Türk and Rebecca Dowd, as putting the futures of asylum seekers into an asylum lottery.²⁹⁰ Finally, the Revised Eurodac Regulation deals with the

²⁸³ Ibid.

²⁸⁴ European Asylum Support Office op cit (n 282).

²⁸⁵ Op cit (n 225).

²⁸⁶ Op cit (n263).

²⁸⁷ Op cit (n 180)

²⁸⁸ Ibid.

²⁸⁹ Op cit (n263).

²⁹⁰ United Nations High Commissioner for Refugees Assistant High Commissioner for Protection Volker Türk and Rebecca Dowd 'Protection Gaps' The Oxford Handbook of Refugee and Forced Migration Studies June 2014 at paras. 279 - 281.

guidelines related to the collection, transmission and storage of the fingerprints of asylum seekers inter alia for the purpose of detecting and preventing crimes of terrorism.²⁹¹

5 Treatment of women in spite of the existence of legal obligations

5.1 Overcrowding in reception camps

Upon arrival in the European Union refugees are required to register at a reception centre where they are required to stay during the processing of their asylum application. According to the United Nations High Commissioner for Refugees, reception centres are facilities where refugees are given temporary shelter, food, health care and sometimes a stipend while they await the outcome of their asylum application.²⁹² Reception centres in the European Union are regulated by the new Reception Conditions Directive.²⁹³ The recast Reception Conditions Directive looks at, inter alia, the living conditions of asylum seekers while they await the decision. The Directive aims at establishing living standards for asylum seekers that have and promote a sense of dignity within the EU.²⁹⁴ Article 17 of the Directive obliges states to see to it that asylum seekers receive an “adequate standard of living” in which they are protected mentally and physically.²⁹⁵ The majority of these reception centres were created to be temporary and were never intended to hold large numbers of people for long periods of time.²⁹⁶ However, due to high numbers of arrivals, reception centres are sometimes forced to take more than their capacity which causes backlogs and undue delays in the application process which in turn means that refugees are forced to remain in reception facilities far longer than the necessary time.

In order to make sure that refugees do not engage in what has been termed as ‘asylum shopping’ in which they go from state to state seeking the best asylum deals, the Dublin III Regulation requires refugees to register for asylum in the first member state they enter.²⁹⁷ While in theory this may seem like a fair way to make sure refugees are spread out fairly throughout

²⁹¹ Revised Eurodac Regulation 2013/32/EU of the European Parliament and of the Council of 26 June 2013. *OJ* 2013 L 180/60.

²⁹² UNHCR ‘Reception Centres: Quality of life and services’ (2016) <http://www.unhcr.org/ceu/106-enwhat-we-dooverseeing-reception-conditionsreception-centres-html.html> accessed on 23 October 2018.

²⁹³ Op cit (n263).

²⁹⁴ Ibid.

²⁹⁵ Article 17(2) of the Reception Conditions Directive op cit (n180).

²⁹⁶ Asylum Information database. <http://www.asylumineurope.org/reports/country/greece/reception-conditions/housing/conditions-reception-facilities>

²⁹⁷ Freedman discussing the impact of the Dublin III Regulation on asylum seekers, especially asylum seekers who are women op cit (n27) at 426.

the European Union Freedman points out that this system may in actual fact be disadvantageous to refugees based on the fact that refugees end up being forced to stay in their countries of first arrival leaving some member states with higher numbers of refugees than their facilities can accommodate, thereby resulting in overcrowding in reception centres.²⁹⁸ Between 2015 and 2018 the European Union member states that received the majority of first time application were Germany, Sweden, Hungary, Italy, Austria and France. Germany, Sweden, Hungary and Austria reported to have 66 per cent of all first time applications during this time. Consequently, these are also the member states that have struggles with reports of overcrowding in their reception centres as well as the emergence of dangerous alternatives forms of accommodation such as the Calais camp in Germany which due to its deplorable conditions was closed down.

Additionally, overcrowding and a daily increase in the refugee population in Greece, has resulted in the asylum system being very slow and lacking in efficiency. For this reason refugees cannot be guaranteed of how long they may need to remain in Greece. The WRC found that the lengthy stays in Greece were making women and girls more prone to abuse and additionally that infrastructure at refuge sites was not designed to be protective for women and neither was it designed with response areas where women can easily access staff if they are in danger or need of protection.²⁹⁹ One refugee woman commented that the site where they were living was unsafe and that they were always hearing stories of rape and as result she made sure that her family always stayed together.³⁰⁰

However tents where families live together are also proving to be dangerous for women and children. Once again the problem is attributed to the lengthy stay in the overcrowded Greek reception centres where increase in domestic violence among refugees has been reported.³⁰¹ Refugee officials report that people are beginning to feel desperate, hopeless, isolated from the world- this mixed with depleting finances, poor housing conditions as well as lack of clarity about the future is often the reason for domestic fights. Men are feeling helpless and so they resort to violence to let out their frustrations.³⁰²

Overcrowding especially on the Greek islands is reported to by the Asylum in Europe website to be reaching levels of inhumanity and degradation which completely falls short of

²⁹⁸ Ibid.

²⁹⁹ Women's Refugee Commission op cit (n59) 15.

³⁰⁰ Women's Refugee Commission op cit (n59) 16.

³⁰¹ Ibid.

³⁰² Ibid.

the standards set out in the Reception Conditions Directive.³⁰³ Overcrowding affects women disproportionately as the threats of physical and sexual violence increase as men and women are forced to share sleeping and sanitation facilities. In 2018 the United Nations High Commissioner for Refugees reported that threats of “sexual violence” against women had risen because of “overcrowding.”³⁰⁴ Women who are travelling alone or with children are especially at risk because they find themselves sharing tents with single men and men they are not related to. This also means there is no privacy and further reports state that women are often afraid to go to the toilets or bathrooms for fear of being followed by men. This can be very difficult for women who are on their period as they are unable to shower because men walk in while women are in the showers.³⁰⁵

According to Bonewit, another effect of overcrowding is that targeted harassment and discrimination is much harder to detect therefore leaving women and children at the mercy of victimisation.³⁰⁶

5.2 Undue length of the asylum

In order to ensure that asylum procedures are fair, the recast Asylum Procedures Directive³⁰⁷ provides guidelines to ensure that asylum process within the European Union are conducted more smoothly and efficiently. If this new Directive is working well then the CEAS envisions a situation where an asylum application will not take more than six months to be reviewed from start to finish.³⁰⁸

Undue delays affect refugees women in that they remain without status for long periods of time. Without status, one is forced to remain at the reception centre for an indefinite period. For someone who has been on a dangerous and challenging journey this period of uncertainty can have an impact on their mental, emotional and psychological wellbeing. It may even cause or aggravate physical health problems. The problem with falling ill either with psychological or physical health problems is that health care for asylum seekers is limited. Asylum seekers with no status are only entitled to health care in an emergency, with the exception to pregnant women.

³⁰³ Op cit (n263).

³⁰⁴ UNHCR op cit (n 62).

³⁰⁵ Ibid.

³⁰⁶ Bonewit op cit (n65) 24.

³⁰⁷ Op cit (n 225).

³⁰⁸ Op cit (n 284).

Without status, freedom of movement is heavily policed and asylum seekers are required to stay in certain areas of the reception centre so that officials can locate them easily.

Finally, lengthy delays in the asylum application process that cause undue delays also mean that vulnerable persons are not discovered timeously and may miss the opportunity for psychological or medical assistance which may exacerbate their psychological and physical health conditions without the chance of medical intervention because of the health regulations as discussed above.

5.3 Poorly conducted interviews and lack of information

According to Bonewit one of the reasons refugee women find themselves in positions of disadvantage is because they do not know their rights.³⁰⁹ To this Wendy Young adds that when women receive proper assistance, they consequently receive adequate protection, because protection and assistance go hand in hand thereby confirming the old saying – ‘knowledge is power’.³¹⁰ Freedman notes that although the European Union Common European Asylum System demands that gender sensitivity be made an intrinsic part of the asylum process, in practice not much has been done in order to augment women’s access to information and protection within the European Union asylum system.³¹¹

As has been mentioned some reception centres are struggling with the issue of overcrowding which means that they are having to operate above their capacity.³¹² On one hand this means that there is an urgency to push people through the system as fast as possible while on the other hand people may be forced to wait for a very long time to get registered or to begin their asylum application. Where refugee women are concerned, one of the consequences of waiting for a long time is that there is a delay in them being made aware of their rights and receiving information that may be useful to their asylum case or that may be useful in relation to their health care needs.

However, reports have surfaced stating that during interviews with administrators, asylum seekers were not always being told about the asylum procedure properly or at all.³¹³ It has also been reported that during their interviews asylum seeking women were not being

³⁰⁹ Bonewit op cit (n65) 24.

³¹⁰ Young op cit (n86) 39.

³¹¹ Freedman op cit (n27) 20.

³¹² UNHCR op cit (n62).

³¹³ Freedman op cit (n27) 20.

informed of the benefits they had access to such as their entitlement to a legal representative the kinds of situations that would warrant legal representation.³¹⁴ They were also not being informed of their rights as women. Further, they were not being informed of the fact that they had a better chance of success if they applied for asylum as an individual versus if they applied under a family member.³¹⁵ Vulnerable asylum seeking women were not being made aware of the fact that they were eligible to certain special rights such as medical attention, counselling and being housed separately but added to this Freedman notes that officials were not looking out for vulnerable women despite having being instructed to do so during their training.³¹⁶ Finally, where asylum seeking women had experienced sexual violence, they were not being made aware of their rights or the procedures they could pursue. This was either because their official had not done so or because women were unwilling to share details regarding attacks of the sexual nature in front of family members or to male officials.³¹⁷ For this reason women who had been violated sexually would be afraid to report incidences to the police or reception centre administrators.

6 Rape is a form of torture and should only be treated as such³¹⁸

According to Wendy Young and Rashida Manjoo, the experience of being a refugee exposes women to vulnerability that puts them at a higher risk of sexual abuse, violence and exploitation.³¹⁹ One of the most common crimes but least reported and least documented crimes against refugee women is the crime of rape.³²⁰ According the United Nations High Commissioner for Refugees the precise estimations of the number of refugee women who are raped are not easy to determine as a majority of rape cases remain unreported due to the shame associated with rape.³²¹ The WRC has further stated that incidences of rape and sexual assault of refugee women remain high but unreported as refugee women move quickly between

³¹⁴ Bonewit op cit (n65) 26

³¹⁵ Ibid.

³¹⁶ Freedman op cit (n27) 26.

³¹⁷ Freedman op cit (n27), further the Asylum Procedures Directive demands that women should be interviewed alone if the official suspects that she may have experienced any sexual violence and further that women should be interviewed by female officials.

³¹⁸ This paper will be looking at the fact the refugee women are exposed to sexual violence as a result of inadequate protection. Rape of refugee women should not be treated nonchalantly by EU member states and should be afforded the same status as any other kind of torture or cruel, inhuman and degrading treatment.

³¹⁹ Manjoo and Young op cit (n86).

³²⁰ Robbers op cit (n69) 15.

³²¹ UNHCR 'United Nations High Commissioner for Refugees' (1995), Sexual violence against refugees: Guidelines on protection and response, Geneva.

member states and therefore have limited access to health facilities or justice officers.³²² Further, where refugee women do have access to facilities where they can report incidences of sexual violence, a number of women are afraid of victimisation and not being believed by reception centre staff and police.³²³ However, Pearce estimates that at least 50% of all refugee women have been raped.³²⁴

As has already been discussed one of the consequences of the overcrowded camps and reception centres in Lesbos is limited protection and safety of women which means an increase in cases of rape and other forms of sexual assault. These sexual crimes perpetrated against refugee women are not only perpetrated by refugee men but by European Union officials.³²⁵ According to Human Rights Watch, there are reports that sometimes women were guaranteed that their applications would be fast-tracked in exchange for sex.³²⁶ Refugee women have also reported that they had experienced various forms of violence, including sexual violence at the hands of officials in Turkey on their way from Turkey to Greece.³²⁷ One woman is reported to have been separated from her family and was held by police in Turkey for 45 days in which she says she was abused sexually.³²⁸

In the following section this paper shall engage in a discussion that demonstrates the severity of rape. Rape is a form of torture, it is cruel, it is inhuman and it is degrading. Rape of refugee women should not be treated as a common crime that is part of the refugee experience but should warrant prosecution.³²⁹ This paper has at various points and from various sources demonstrated that refugee women are complaining that they are being sexually assaulted. Perhaps the biggest failure in the protection of asylum seeking women has been the silence on matter and unclear methods of how to combat rape and sexual torture in order to decrease their instances for women seeking asylum in the European Union.

³²² Women's Refugee Commission op cit (n59) 17, Freedman op cit (n57) 15 and See also Freedman op cit (n27) 24.

³²³ Ibid.

³²⁴ H Pearce 'An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture' (2003) 14 *Int'l J R L* 4: 534–560.

³²⁵ Freedman op cit (n27) 430.

³²⁶ Human Rights Watch 'As though we are not human beings: Police brutality against migrants and asylum seekers in Macedonia' *Human Rights Watch*.

³²⁷ Freedman op cit (n27) 22.

³²⁸ Medecin Sans Frontiere psychologist report as is cited in Freedman op cit (n27) 22.

³²⁹ MJ Kronenberger 'Refugee Women: Establishing a Prima Facie Case under the Refugee Convention' (1992) 15 *ILSA J. Int'l L.* 61 at 68.

6.1 Understanding the violence that is rape.

Rape is very personal kind of violence that is carried out on the body of a woman.³³⁰ Its consequences can be very damaging for that woman, for her family and her community.³³¹ The consequences of rape are not only physical but are also psychological, social and even fatal should the survivor contract a deadly sexually transmitted illness or HIV.³³² Tragically, when it comes to issues of rape, women are often not believed, they are victim-blamed and the crimes and criminals often go unpunished.³³³ As per the vulnerability and disadvantage discussions offered above, the more disadvantaged a woman or girl is the less attention her rape will get. This means that the rapes of refugee women and girls are often treated as the natural occurrences in the refugee experience and therefore little is done to fight against it.

In demonstrating the severity of the crime of rape this paper draws its arguments from research which shows that rape is not a mere physical act but that rape has been used for centuries as a tool for war.³³⁴ If it has been used as a tool of war, it cannot be treated as anything less.³³⁵

One of the scholars who has written extensively on the use of women's bodies as sites of mass public violence is Catherine MacKinnon.³³⁶ MacKinnon holds the view that violence against women's bodies is often not taken seriously because the object and site of the violence happens to be the body of a woman.³³⁷ Women and girls are discriminated against for the mere reason of being women and girls. In the article '*Rape, genocide and Women's Human Rights*' MacKinnon argues that human rights are not treated as rights for women because rights that are due to all human beings for one reason or the other are often rights that women do not have access to.³³⁸

She highlights two main points as being the reasons for which the rights for women are ignored or obscured. The first is that when community, national or international tragedies and

³³⁰ Catherine MacKinnon: *Rape, Genocide, and Women's Human Rights* p 3-5

³³¹ MacKinnon op cit (n331) 4 and M. Jane Kronenberger, *Refugee Women: Establishing a Prima Facie Case under the Refugee Convention*, 15 ILSA J. Int'l L. 61 (1992)

³³² Ibid.

³³³ Freedman op cit (n27) see generally 420-422.

³³⁴ Kronenberger op cit (n 332) 68-69.

³³⁵ See generally the discussion by M Kronenberger in which she uses specific examples of how rape has been used a tool for war op cit (n332) 68-72.

³³⁶ Catherine MacKinnon: *Rape, Genocide, and Women's Human Rights*

³³⁷ MacKinnon op cit (n) 6.

³³⁸ Ibid.

atrocities are committed against a group of people, such tragedies and atrocities are given an all-encompassing name such as ‘the Rwandan genocide’, ‘the Jewish holocaust’ or ‘the Syrian war’ and are therefore never recorded in history as violations to or against women.³³⁹ This is the neutrality in language that was discussed in the previous chapter. While it is important to record these atrocities, it is equally important to record the fact that these atrocities were committed against women.³⁴⁰ The importance of recording crimes and especially crimes against women lies in the fact that information about what victim’s experience helps national governments and policy makers learn how to deal with that matter and offer better protection to specific groups of vulnerable people should it arise again.³⁴¹

Furthermore, the abuses that women suffer are treated as either being too specific to women or are treated as being too general to human rights to be applicable to women.³⁴² In line with this, Mackinnon points out that the second reason as to why the rights of women are neglected is based on the private-public distinction. Despite recent changes in policy and law that criminalise gender-based violence in the home, the state remains very cautious about entering into the private domain and wrongs committed against women in the home or community are not really considered to be violations of human rights.³⁴³ Abuse meted out against women in intimate relationships or in the private domain is only treated as domestic violence that commonly happens to women anyway that is not worthy of being pursued or having state resources allocated to it. With regards to crimes carried out against women, Mackinnon notes that,

‘...in the record of human rights violations they are overlooked entirely because the victims are women...when a woman is tortured by her husband in her home, humanity is not violated. Here is a woman and only a woman. Her violation outrages the conscience of few beyond her friend.’³⁴⁴

The significance of rape as a crime not only lies in its nature as a personally invasive crime that violates the bodily integrity of another but also in its power as an action of domination, subjection and control. Rashida Manjoo and Calleigh McRaith in their article ‘Gender-Based Violence and Justice in Conflict and Post-Conflict Areas’ liken rape to war. According to these scholars, war is patriarchal in nature while rape is used by men as a

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Van Dijk. 2000. Implications of the international crime-victim surveys for a victim perspective. pg 97-98

³⁴² McKinnon op cit (n) 6.

³⁴³ Women’s Rights are Human Rights. UN Human Rights Office of the High Commission. Geneva. 2014. 26

³⁴⁴ Ibid pg 5 and 6 .

patriarchal expression of male dominance over women.³⁴⁵ The characteristics of war include aggression that results in dominance and dominance that results in the subjection and control of a community of people or a country. Likewise, the characteristics of rape are aggression that results in dominance and dominance that results in subjection and control of the body of another, usually a woman or child.³⁴⁶

Further, Kronenberger, Manjoo and McRaith all agree that rape has been used in conflict situations as a tool of war to cause the fabric of a community or country to disintegrate.³⁴⁷ MacKinnon holds the same view and points out that the intention of war is to bring about a genocide and that since rape is used as a weapon for war, rape too becomes a tool for genocide.³⁴⁸ MacKinnon treats rape as genocide because genocides are intended to destroy people. There can be no doubt about the fact that rape destroys lives. It is also reported that in conflict situations rape is executed violently and brutally in gangs or with objects such as knives and guns.³⁴⁹ Manjoo et al reiterate that rape and sexual abuse are not just consequences of war but intentional and planned strategies that are intended to subvert civilians. Furthermore, this violence spreads from conflict areas to 'safe zones' such as refugee camps.

Not only is rape and the threat of rape an infringement of the rights of the bodily integrity and dignity of refugee women but also of their reproductive rights.³⁵⁰ The refugee journey is not an easy one as it not only takes a physical toll on women but a psychological toll too. One such psychological effect of living in fear of being raped is rape anxiety. Rape anxiety is a type of anxiety that develops as a result of living in continued anticipation of rape and sexual violence. Other psychological effects of rape include but are not limited to depression, shock, trauma, loss of memory, anxiety, post-traumatic stress disorder, damage to sexual and reproductive organs which may cause infertility and complicated pregnancies or miscarriages in some women who are attacked while pregnant. Other consequences include feeling hopeless, feeling as if one has lost control, anger and shame.³⁵¹

³⁴⁵ R Manjoo & C MacRaith 'Gender-based Violence and Justice in Conflict and Post-conflict Areas' M. Jane Kronenberger, *Refugee Women: Establishing a Prima Facie Case under the Refugee Convention*, 15 ILSA J. Int'l L. 61 (1992) pp 68-69.

³⁴⁶ Manjoo and MacRaith op cit (n346) 11.

³⁴⁷ Ibid and see M J Kronengerger above.

³⁴⁸ MacKinnon pg 8.

³⁴⁹ Manjoo and MacRaith op cit (n346) 11.

³⁵⁰ Robbers op cit (n59) 27.

³⁵¹ Manjoo op cit (n86).

Having outlined how physically, mentally, emotionally and psychologically damaging the violation of rape is, it can be accepted that the response of the European Union to the accusations of sexual harassment and rape of refugee women within the European Union is highly insufficient and is being treated without the requisite understanding or seriousness. Where reporting systems are available such as within reception centres, rape is often treated lightly and without sensitivity. This puts women at risk of re-victimisation, humiliation and re-traumatisation.

7 Chapter conclusion

In conclusion it has been demonstrated that the European Union not only has regionally binding legal obligations to assist asylum seekers, but that they have international obligations that require them to ensure that refugee and migrant seeking women who have fled persecution are guaranteed a fair chance to apply for refugee status and to receive if they meet the requirements. It was also demonstrated in this paper that due to the fact that gender is not a listed ground in the 1951 Refugee Convention, women may face challenges when they apply for asylum for gender specific reasons. In such instances, it remains to States to develop their legislation and common laws so that they conform to the spirit and purport of the 1951 Refugee Convention which is to ensure that people who are fleeing persecution find protection in in the international community.

In light of the above, the European Union must investigate the living conditions in the Greek camps and must deal with the issue from one of its primary roots, which this paper has identified as the EU-Turkey deal. This shall be dealt with in the following chapter.

Chapter Four

The Consequences of the EU-Turkey Agreement for Refugee and Migrant Women

1 Introduction

This chapter intends to analyse the legal and social implications of the EU-Turkey Agreement and the effect that these implications have on refugee and migrant women who are seeking international protection in the European Union.

The EU-Turkey Agreement has proved to be disadvantageous to refugee and migrant women as it threatens their rights to seek asylum in European Union Member States owing to the fact that the European Union has, albeit incorrectly, declared that Turkey is a safe country. Turkey is not safe for its citizens with over one million people having been internally displaced due to ‘conflict and violence’.³⁵² If Turkey is not safe for its citizens, it can by no means be regarded as a safe enough country for refugees.³⁵³ Furthermore, Turkish and Greek sea patrol have been pushing back boats with refugees and migrants and have been accused by the United Nations High Commissioner for Refugees of potentially running the risk of sending people back to countries where they are fleeing persecution.³⁵⁴ If this is the case, Turkey may be in breach of the principle of non-refoulement en masse.

Turkey is also being reported to using the detention system arbitrarily and to the detriment of refugees and migrants.³⁵⁵ With regards to women who are being detained, this disrupts or even removes their chance to apply to be reunified with their families who are already in Europe as arbitrary detention is usually followed by being sent back to the country one is coming from.³⁵⁶ The risks of unfair detention and deportation are very high for refugees and migrants including women.

Finally the ‘one-to-one resettlement deal’ has been criticised as being unfair to refugees and migrants on the basis that one Syrian is resettled in the European Union but it is not clear what happens to the Syrian who is deported from Greece to Syria. There is a presumption that

³⁵² The exact number as is reported by various websites is around 1.3 million as of December 2017. Figures obtained from the *Internal Displacement Monitoring Centre* ‘Turkey’ available at www.internal-displacement.org/countries/turkey accessed on 21 January 2019.

³⁵³ Discussion below on the criteria of a safe country and why Turkey does not qualify.

³⁵⁴ UNHCR ‘UNHCR redefines role in Greece as European Union -Turkey deal comes into effect’ available at <https://www.unhcr.org/news/briefing/2016/3/56f10d49/unhcr-redefines-role-greece-eu-turkey-comes-effect.html> accessed on 20 January 2019.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

from Turkey, such refugees might be returned to their country.³⁵⁷ This would undoubtedly put Syrian refugees and migrants at the risk of refoulement. Furthermore the one-to-one resettlement deal unfairly discriminates between refugees by using nationality as a basis of selection. It does so on the basis of making Syrian refugees a resettlement priority. In doing so it overlooks the fact that there may be vulnerable women and persons from other nationalities, who due to the trauma they may have encountered may be in need to be prioritised for resettlement.

2 Background

The 2015 European Union refugee influx saw over a million refugees and migrants entering into Europe.³⁵⁸ It is also reported that European Union Member States received about 1.3 million asylum applications in that year.³⁵⁹ In order to reach Europe, refugees and migrants would mostly engage the boat services of smugglers who would transport them to the shores of European countries.³⁶⁰ The boats they would travel in would be overloaded and unfit for the purposes of transporting people across long sea distances.³⁶¹ Smugglers were instrumental in the illegal transportation of refugee and migrants to Europe and for doing so at exorbitant prices.³⁶² Apart from benefitting from financial exploitation, smugglers were also accused of physically and sexually abusing refugees and migrants especially women and children.³⁶³ As a result of travelling in unsuitable and overcrowded boats many refugees and migrants lost their lives at sea. The exact number of those who died on these voyages is unknown although it is estimated that 3770 may have drowned in 2015 alone.³⁶⁴

³⁵⁷ Jesuit 'The European Union -Turkey Deal: Analysis and Considerations, Jesuit Refugee Service Europe Policy Discussion Paper' April 2016 available at https://jrseurope.org/publication/assets/publication/file/jrs_europe_eu_turkey_dealpolicy_analysis_2016-04-30.pdf accessed on 16 December 2018.

³⁵⁸ European Parliament 'European Union migrant crises: facts and figures' op cit note 19.

³⁵⁹ Eurostat <https://europa/eurostat/documents2995521/7203832/3-040321016-AP-EN.pdf/790eba10-381c-4163-bcd2-a54959b99> accessed on 12 March 2018.

³⁶⁰ European Stability Initiative 'The Refugee Crises through Statistics' 30 January 2017 available at <https://www.esiweb.org/pdf/ESI%20-%20THE%20refugee%20crisis%20through2520statistics%20-252030%20Jan%202017.pdf> accessed on 20 November 2018.

³⁶¹ Ibid at 19.

³⁶² EU -Turkey Statement op cit note (n35).

³⁶³ Robbers op cit (n69) at 27.

³⁶⁴ Frontex op cit (n22) 16

On the 23 April 2015 the European Council met to discuss the matter of refugees and migrants drowning at sea.³⁶⁵ Their focal points of discussion were increasing sea and coastal guards and combatting smuggling in order to end the illegal and irregular flow of refugees and migrants into Europe.³⁶⁶ On 13 May 2015 the European Union voted into effect a policy known as the European Agenda on Migration.³⁶⁷ The focus of this Agenda was to improve ‘responsibility-sharing’ of asylum seekers among the Member States by introducing a quota system to ensure that asylum seekers were distributed evenly throughout the European Union.³⁶⁸ This Agenda was not received well by some European Union Member States who were not in support of the notion of ‘mandatory relocation’ and the quota system of sharing responsibility.³⁶⁹

On 29 November 2015 the ‘heads of State of the European Union and Turkey’ agreed to a proposal on the joint partnership between the European Union and Turkey.³⁷⁰ In this meeting it was agreed that because of its geographical location, Turkey would be able to assist in reducing the flow of refugees and migrants into Europe.³⁷¹ It is worth stating at this point that at the time of the negotiations between Turkey and the European Union, Turkey was dealing with its own matters with regards to assisting its own refugees and asylum seekers – so in agreeing to the EU-Turkey deal, Turkey was in fact agreeing to host more refugees over and above those they had been hosting.³⁷²

On 18 March 2016, the European Union and Turkey released the joint EU-Turkey Statement in which the parameters of their agreement as stated directly above are set out. According to the European Stability Initiative, after the conclusion of the EU-Turkey Agreement the number of refugees and migrants coming into Europe ‘irregularly’ dropped.³⁷³ By way of example, prior to the conclusion of the agreement, 26 971 refugees arrived in Greece

³⁶⁵ European Council ‘Timeline response to migratory pressures’ n.d. available at <https://www.consilium.europa.eu/en/policies/migratory-pressure/history-migratory-pressure/> accessed on 20 January 2019.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ H Gavin op cit (n174).

³⁷⁰ European Council ‘Timeline response to migratory pressures’ op cit (n366).

³⁷¹ Ibid.

³⁷² According to the UNHCR Turkey is currently hosting the largest number of refugees in the world. Please see UNHCR ‘Refugees and Asylum Seekers in Turkey’ n.d. available at <https://unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey> accessed on 18 January 2019.

³⁷³ European Stability Initiative op cit note (n 361) at 16.

in March 2016, whereas in April 2016, 3650 refugees arrived in Greece and by December 2016 the number had dropped to 1662.³⁷⁴

The EU-Turkey Agreement is an agreement between the European Council and the Turkish government that was reached in a bid to ‘reduce the flow of irregular migration via Turkey to Europe.’³⁷⁵ According to this agreement ‘all new irregular migrants’ arriving in Greece from Turkey would be sent back Turkey. This would also include those who did not qualify for asylum such as economic migrants.³⁷⁶ A ‘resettlement plan’ was also actioned, in which the European Union agreed that for every Syrian refugee sent back to Turkey by Greek authorities, one would be resettled from Turkey into the European Union.³⁷⁷ Turkey also committed to ensuring that ‘new land and sea routes between Turkey and the European Union’ would not be opened.³⁷⁸

Furthermore, the process of ‘visa liberalisation’ which would allow Turkish citizens to travel without visas in the European Union would be sped up and the process of absorbing Turkey into the European Union would remain open for discussion.³⁷⁹ The European Union pledged three billion euro to assist Turkey with its refugees and pledged a further three billion before the end of 2018 to maintain this support. Finally, the European Union and Turkey pledged to work on the creation of safe zones in Syria.³⁸⁰

3 EU-Turkey Agreement: Implications and consequences for refugee women

The EU-Turkey Agreement has come under much scrutiny especially with regards to its compatibility with international protection standards.³⁸¹ One of the critiques levelled against it is found in its reference to ‘irregular migrants’ which has been condemned by Emanuela Roman, Theodore Baird and Talia Radcliffe as overlooking the fact that the majority of ‘irregular migrants...are actually asylum seekers’ and that failure to amend this wording may have far-reaching legal implications especially for asylum seekers who are in need of

³⁷⁴ Ibid.

³⁷⁵ Op cit (n35).

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ Women’s Refugee Commission op cit (n59) entire document dedicated to this argument.

international protection and may be denied it on the basis of everyone being treated as illegal migrants.³⁸²

3.1 'Return to Turkey': Turkey identified as a safe third country and the risk of refoulement

According to the first action point of the EU-Turkey Agreement, 'All new irregular migrants crossing from Turkey to Greece...will be returned to Turkey...Migrants not applying for asylum or whose application has been found unfounded or inadmissible...will be returned to Turkey.'³⁸³

While one of the main concerns of the European Union is reducing the flow of 'irregular migrants' into their Member States by using Turkey as a third country, the EU-Turkey Agreement poses a risk of breaching the principle of non-refoulement and further Turkey should not be regarded as a safe third country to which refugees and migrants can be returned.

The notion of a safe third country is not defined in the 1951 Refugee Convention but States who rely on the principle have used an extremely narrow interpretation of section 31(1) of the 1951 Refugee Convention which prohibits asylum seekers from being penalised for unlawfully entering States while they flee persecution.³⁸⁴ The narrow interpretation assumes that the person who is fleeing persecution may at the time of her journey possibly pass through a state where she is safe to apply for asylum on her way to her desired country of asylum.³⁸⁵

This principle has been incorporated into European Union asylum law in Article 33(2)(c) of the Asylum Procedures Directive which States that 'a claim for international protection...may be considered inadmissible if a country that is not a Member State is considered to be a safe third country'.³⁸⁶ According to Article 38(1) of the Asylum Procedures Directive, the substantive requirements that must exist in order for a country to be considered as a safe third country are; respect of the rights of life and freedom from racial, religious, national, politically and socially associated discrimination, respect of the notion of non-refoulement, protection from the possibility of 'suffering serious harm', respect of the principle of 'prohibition of removal' and the opportunity for an individual to be granted refugee status if

³⁸² E Roman, T Baird & T Radcliffe 'Why Turkey is not a "Safe Country"' 2016 *Statewatch* available at <https://www.statewatch.org/analyses/no283-why-turkey0-is-not-a-safe-country.pdf> at 9.

³⁸³ EU -Turkey Statement op cit note (n35).

³⁸⁴ Section 31(1) 1951 Refugee Convention also see E Kjaegaard (n390).

³⁸⁵ Roman, Baird & Radcliffe op cit (n383) 6.

³⁸⁶ Article 33(2)(c) of the Procedures Directive 2013/32/European Union of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

they apply and qualify.³⁸⁷ The procedural requirements that must exist on order for a State to be recognised as a safe third country are; there must be a ‘connection between the person applying and the third country.... [that make it] reasonable for the individual to go to that country’, satisfaction that the third country is safe in general and satisfaction that the third country is safe for the ‘particular applicant’.³⁸⁸

E Kjaegaard describes a safe third country as a country where a refugee ‘can enjoy asylum without danger’.³⁸⁹ In a further explanation, when ‘an asylum seeker is denied access to substantive refugee determination procedures in a particular State on the ground that he or she already enjoyed, could or should have requested and, if qualified, would actually have been granted refugee protection in another country, this concept of protection elsewhere may be described as “country of first asylum”, “country responsible for examining the application for asylum”, or “host third country”’.³⁹⁰

The notion of a safe third country finds explanation in the Executive Committee of the High Commissioner’s Programme (EXCOM) Resolution 657 where the tendency of refugees and migrants ‘who move in an irregular manner from countries in which they have already found protection, in order to seek asylum elsewhere’ can be returned ‘to the country where they have already found protection’.³⁹¹

3.1.1 Why Turkey cannot be regarded as a safe third country

According to Emma Sinclair-Webb, human rights and the rule of law in Turkey are at the ‘worst level’ they have been.³⁹² According to a report released by the United Nations High Commissioner for Refugees, human rights in Turkey continue to be violated because of on-going ‘internal conflict’ between the government and the ‘Kurdistan Workers Party’.³⁹³ This

³⁸⁷ Article 38(1)(a)-(e), further according to Article 15(a)-(c) of the Qualification Directive: Serious harm includes; ‘death penalty, torture, degrading or inhumane treatment, threat to life, indiscriminate violence’.

³⁸⁸ Article 38(2)(a)-(c).

³⁸⁹ E Kjaegaard ‘The concept of “Safe Third Country” in Contemporary European Refugee Law’ 1994 6 Int’l L. J. R. L 649 at 651.

³⁹⁰ Ibid.

³⁹¹ United Nations Economic and Social Council: Executive Committee of the High Commissioner’s Programme, Resolution 657 (XXV) 30 April 1958.

³⁹² Emma Sinclair-Webb ‘No, European Union, Turkey is not safe for everyone’ *Open Democracy* available <https://opendemocracy.net/emma-sinclair-webb/no-eu-turkey-is-notsafe-for-everyone> accessed on 18 January 2018.

³⁹³ UNHCR ‘Turkey UN report details extensive human rights violations during protracted state of emergency’ *OHCHR* accessed at <https://www.ohchr.org/EN/news/Events/Pages/DisplayNews.aspx?NewsID=22853> accessed on 21 January 2019.

conflict has resulted in increased levels political and social insecurity especially within the south-east region of the State where reports of mass arrests of civilian, killings, arrests, torture, violence against women, sexual abuse and bombings have been recorded.³⁹⁴

Human Rights Watch further report that ‘state violence’ has led to ‘civilian deaths and population displacement.’³⁹⁵ Furthermore and according to Roman, Baird & Radcliffe, those who try speak against the violence have been ‘targeted by the government and accused of terrorist propaganda and insulting the Turkish Republic.’³⁹⁶ United Nations High Commissioner for Human Rights Zeid Ra’ad Al Hussein expressed his alarm at a report on the state of Turkey that detailed how, 100 ante-natal and post-natal women had been put in detention on the basis that their husbands were allegedly linked to ‘terrorist organisations’.³⁹⁷ Some were detained with their children and some were violently separated from them. ‘This is simply outrageous, utterly cruel and surely cannot have anything to do with making the country safer’.³⁹⁸ These events which have been described by the United Nations High Commission for Human Rights as being ‘extensive human rights violations’, are not compatible with the Commission’s definition of a safe country, in which a safe country has been outlined as being a country that does not produce refugees or in which refugees can enjoy asylum.³⁹⁹

These acts of violence being perpetrated in Turkey suggest that the requirements for a safe third country as are set out in Article 38(1) and 38(2) of the Asylum Procedures Directive are not adequately satisfied.⁴⁰⁰ Furthermore, the requirement of ‘no risk of serious harm’ in Article 15 of the Qualification Directive is not satisfied as the report gives evidence of murders, torture, inhumane treatment, indiscriminate violence and internal conflict.⁴⁰¹ With regards to refugees and migrants, Roman, Baird and Radcliffe believe that they are unsafe in Turkey on the basis that they may ‘face obstacles which may increase their risk of serious harm’.⁴⁰²

³⁹⁴ Ibid

³⁹⁵ Roman, Baird & Radcliffe op cit (n383) 12.

³⁹⁶ Ibid.

³⁹⁷ UNHCR ‘Turkey UN report details extensive human rights violations during protracted state of emergency’ op cit (n 394).

³⁹⁸ Ibid.

³⁹⁹ UNHCR ‘Note on International Protection (submitted by the High Commissioner) A/AC.96/777’ 9 September 1991 accessed at <https://www.unhcr.org/excom/excomrep/3ae68c050/note-international-protection-submitted-high-commissioner-html> accessed on 21 January 2019.

⁴⁰⁰ Op cit (263).

⁴⁰¹ Qualification Directive op cit (n180).

⁴⁰² Roman, Baird & Radcliffe op cit (n383) 16.

One of the obstacles faced by refugees and migrants is the fact that Turkey ‘does not grant full legal status to refugees who come from outside of Europe’, ‘due to the geographical limitation of Turkey’s accession to the Geneva Convention’.⁴⁰³ Without refugee status it becomes difficult to enjoy basic rights such as the socio-economic rights of housing, work and healthcare. Not having refugee status also puts asylum seekers at risk of being detained which may be dangerous for asylum seekers on account of the fact that the Turkish government is accused of its harsh treatment of detained asylum seekers.⁴⁰⁴ Amnesty International and the Global Detention Project both reported that the ‘conditions for detention in Turkey regularly amount to inhuman and degrading treatment’.⁴⁰⁵ In light of this, Turkey cannot be said to be a safe third country for women especially if there is a risk that they may be exposed to inhuman, degrading or cruel treatment in detention in camps or anywhere else in the State.

3.1.2 Risk of refoulement

The principle of non-refoulement is a principle that prohibits States from sending asylum seekers, refugees and migrants back to countries where their lives may be at risk of serious harm.⁴⁰⁶ The principle is enshrined in section 33(1) of the 1951 Refugee Convention.⁴⁰⁷ According to the United Nations High Commission for Human Rights ‘this principle applies to all migrants at all times, irrespective of migration statuses.’⁴⁰⁸ The protection it extends is vital in terms of refugee rights law, human rights law and is an ‘inherent element of the prohibition of torture and other forms of ill-treatment... [and] is characterised by its absolute nature without any exception’.⁴⁰⁹

In *Saadi v Italy* the unconditionally absolute nature of the principle of non-refoulement was emphasised.⁴¹⁰ That is, it was decided in this case that there are no circumstances that

⁴⁰³ Article 61(1), Turkey, Law no. 6458 on 2013 of Foreigners and International Protection, 4 April 2013

⁴⁰⁴ *Abdolkhani and Karimnia v Turkey* 30471/08 22 September 2009, in which the severe detention conditions in Turkey were discussed.

⁴⁰⁵ Amnesty International ‘Europe’s Gatekeeper. Unlawful Detention and Deportation of refugees from Turkey’ 16 December 2015 available at <http://www.amnestyinternational.org/> and Global Detention Project ‘Turkey Detention Profile’ April 2014 available at <http://www.globaldetentionproject.org/countries/europe/turkey/introduction/html>.

and the Global Detention Project

⁴⁰⁶ Article 33(1) of the 1951 Refugee Convention.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ UNHCR ‘The principle of non-refoulement under international law’ available at <https://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> accessed on 20 January 2018.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Saadi v Italy* 2008 2 WLUK 715 ECHR Grand Chamber.

could warrant a person being sent back to a country where their life may be at risk. In this case a Tunisian asylum seeker living in Italy had been tried in Italy and found guilty of involvement in a terrorist organisation which made him a ‘threat to national security’. As a result he been expelled from the Italian State.⁴¹¹ Meanwhile, he was wanted by the Tunisian government because of his involvement with a ‘terrorist organisation’ that was threatening peace in the Tunisian State. In his absence he had been tried and sentenced to a period of twenty years.⁴¹² Mr S argued that he could not return to Tunisia on account of the fact that his life would be at risk of serious harm by the government there.⁴¹³ In an argument raised by the government of the United Kingdom as a party who had interest in this matter, a balancing act needed to be done in order to establish whether Mr S posed a higher risk to national security because on his terrorist associations against the evidence of whether his life would be at risk if he was deported back to Tunisia and that this balancing act needed to be made in the ‘interests of the community’.⁴¹⁴ The court rejected this argument and held that ‘the prohibition of torture applies equally to all person regardless of their conduct’, and furthermore that ‘signatories to the European Charter of Human Rights are not permitted to use a balancing test when deciding whether to extradite or expel terrorists’⁴¹⁵

In 2015 and 2016 Human Rights watch released a report which demonstrated that Turkey was forcing Syrian refugees en masse to return to Syria at the Turkey-Syria border.⁴¹⁶ In a similar report, Amnesty International condemned the mass deportations of Syrians from Turkey to Syrian as well as reports that Turkish guards were shooting Syrians as they tried to cross into Turkey.⁴¹⁷ These are very serious allegations that allude to the fact that Turkey may have breached the non-refoulement principle in a bid, albeit cruelly, to prevent Syrian refugees from coming into Turkey.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid and also see *S v Soering* where the *Saadi* judgment was upheld.

⁴¹⁶ Human Rights Watch ‘Turkey, Syrians Pushed Back at the Border 23 November 2016 available at <https://www.humanrightswatch.org/> accessed on 20 January 2019.

⁴¹⁷ Amnesty International ‘Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in European Union -Turkey deal’ 20 January 2019, available at <https://www.amnesty.org> and Amnesty International ‘Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey’ available at <https://www.amnesty.org> accessed 20 January 2019.

According to the 2017 to 2018 Amnesty International Annual Report, Turkey was still in a state of emergency that was characterised by ongoing human rights violations, suppression of the media and opposing voices as well targeted attacks on civilians and humanitarian agents.⁴¹⁸ These and other violations were taking place although on a much lower scale than in 2016.⁴¹⁹ In this report, Amnesty International also reported that refugees and asylum seekers remained at risk of being forcibly returned back to their countries, this includes Syrian refugees.⁴²⁰

Although the number of refugees and migrants entering Europe is now significantly lower, this has come at the risk of breaching the non-refoulement principle. For women the consequences can be life threatening especially if a woman is sent back to a country where she may have survived torture in the form of sexual and gender based violence or gender based violence.⁴²¹

3.2 Detention of refugee and migrant women

In the case of *M.S.S. v Belgium and Greece* the court pointed out that as per the 1951 Refugee Convention and the European Convention on Fundamental Human Rights, detention of migrants and refugees was only acceptable if it was accompanied by safety measures for the refugees and migrants concerned and if it was done for the purposes of preventing illegal immigration.⁴²² In light of the fact that the 1951 Refugee Convention and the European Convention on Fundamental Human Rights both stipulate the circumstances in which detention can be applied and how it ought to be applied. Reports and testimonies from detention centres in Turkey demonstrate that custodial detention of refugees is not being accompanied by safety measures and is not being used for the purposes of preventing illegal immigration only.⁴²³

Article 15 of the Reception Conditions Directive prohibits the detention of people who are seeking protection for the ‘sole reason’ that are ‘seeking international protection’.⁴²⁴ As has been stressed by this paper at various points, the right to seek asylum is a fundamental human

⁴¹⁸ Amnesty International ‘Annual Report: Turkey 2017/2018’ available at <https://www.amnesty.org> accessed on 20 January 2019.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² *M S S v Belgium and Greece* 3096/09 [2011] ECHR 108.

⁴²³ Freedman op cit (n27) 429.

⁴²⁴ Article 15 of the Reception Conditions Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (applicable from 21 July 2015).

right that should not be arbitrarily and unjustifiably limited. Where an asylum seeker has been detained, Article 16 of the same Directive demands that the detention be resolved in a judicial manner as quickly as possible.⁴²⁵ Article 18 requires detainees to be treated with ‘dignity’ and that those needs of theirs that should arise while they are in detention should be met.⁴²⁶

The conditions in these detention centres are sometimes deplorable and refugees and migrants in detention centres compared their detention conditions to being in prison.⁴²⁷ One refugee pointed out, ‘It’s a cell, not a room! It’s got bars on the windows, what room has that?’⁴²⁸ Another refugee pointed out that, ‘(t)he windows give us no oxygen, there is no oxygen, my skin feels different, itchy, I need Vitamin D from the sun.’⁴²⁹ Added to this, a number of detention centres are marked by their high security walls or fences that are crowned with spiked wires and doors and gates that all secured. In these settings, refugees have testified that being in detention centres makes them feel like criminals. A number of refugees are reported to be in detention for an indefinite period with no information on when they will be released.⁴³⁰

Jesuit Refugee Services have published research that demonstrates that custodial detention as it practised in Turkey is harmful to people.⁴³¹ Their research shows that an alarming number of refugees and migrants suffer from physical and mental health issues such as anxiety, severe depression, insomnia and loss of appetite.⁴³² Furthermore, refugees and migrants who are in good health when they arrive at the detention centres become vulnerable and therefore susceptible to mental illnesses with no recourse to adequate health care or counselling.⁴³³ Mary Bosworth records a number of testimonies from women refugees and migrants who struggle with suicidal thoughts and some who were at her time of writing on

⁴²⁵ Ibid at Article 15.

⁴²⁶ Ibid at Article 18.

⁴²⁷ Jesuit ‘The European Union -Turkey Deal: Analysis and Considerations, Jesuit Refugee Service Europe Policy Discussion Paper’ April 2016 available at https://jrseurope.org/publication/assets/publication/file/jrs_europe_eu_turkey_dealpolicy_analysis_2016-04-30.pdf accessed on 16 December 2018.

⁴²⁸ M Bosworth. *Inside Immigration Detention* (2014) Oxford University Press. United Kingdom at 117.

⁴²⁹ Ibid at 118.

⁴³⁰ Ibid.

⁴³¹ Jesuit note (n 428) 19-20.

⁴³² Bosworth (n429) 118.

⁴³³ Ibid.

suicide watch lists as well as testimonies from those who were struggling with thoughts of harming themselves because detention conditions became unbearable.⁴³⁴

With regards to health care for women refugees and migrants, not all detentions offer health care and in those that do, the quality of care low. According to Bosworth, refugees and migrants are usually only offered basic pain killers as they are not believed by health care staff. There is feeling that since they are in detention they cannot be trusted as being truthful people and that their health complaints cannot be trusted.⁴³⁵ Other problems reported in detention centres included reports that staff were only available at certain times of the day or week and even then sometimes it is only nurses who are available.⁴³⁶

There are further reports that health care staff do not always make use of interpreters even though it is mandatory for them to do so.⁴³⁷ It goes without saying that if a patient cannot describe what they are feeling they cannot get the correct medication. In an unfortunate event, a woman miscarried her baby after having been prescribed medicine for malaria after she complained of being sick.⁴³⁸ Afterwards, she recalls that she was in severe pain but no nurse was available, when a nurse was finally found, she was given a pain killer. She says later on that day she passed her foetus in the toilet and that the next day no one checked on her.⁴³⁹ When women are in detention they have little or no access to sexual and reproductive health care, essentials and sometimes, they have no access to healthy food, thereby putting them at risk of contracting a number of illness with no option to receive medical attention.⁴⁴⁰

Freedman notes the use of detention centres as mechanisms to limit the movement of women and to keep them out of European States.⁴⁴¹ Furthermore, women are being detained arbitrarily and for long or indefinite periods in Turkey. This is a breach of the rules on detention as is set out in the Directives and in the 1951 Refugee Convention.⁴⁴² Therefore the implications and consequences of the EU-Turkey Agreement for women exist between

⁴³⁴ Bosworth (n 429) 118.

⁴³⁵ Bosworth (n 429) 132.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ M Mallochand & L Stanley 'The detention of asylum seekers in the UK: Representing risk, managing the dangerous' (2005) *Punishment and Society* Vol 7, No 1.

⁴⁴¹ Freedman op cit (n27) 429.

⁴⁴² Op cit (n 284).

exposure to violence and harsh treatment or being detained. All being breaches of refugee and migrant women's refugee rights.

4 Conclusion of chapter, women, systems and patriarchy

The EU-Turkey Agreement has been successful in achieving its primary goals of reducing the number of refugees and migrants making use of irregular sea and land routes that put their lives at risk, and managing to reach an overall reduced number of asylum seekers coming into the European Union . It, however has been statistically successful at the expense of refugee and migrant women. This Agreement is putting women's lives at risk of being sent back to the countries they are fleeing from, especially if they are arbitrarily detained or if they do not satisfy the grounds of persecution as they are stipulated in the 1951 Refugee Convention. Finally, the EU-Turkey Agreement may be responsible for separating families and disrupting the reunification process. The neglect of refugee women is not a new phenomenon but one that has existed for centuries although it manifest itself differently in different contexts. According to Arvonne Fraser,

“demeaning a group over time results in stereotyping and the denial of recognition of that group's accomplishments or contributions society. As the demeaning becomes customary, discrimination results, establishing a rationale for the differential treatment of groups and the individuals within a particular group. With discrimination, the less powerful or deprived of their history, their self-confidence, and, eventually their legal ability to function as full citizens or members of the larger group.”⁴⁴³

Refugee women are caught up in a legal culture in which the protection of their rights is at best theoretical and at worst shameful. This is also demonstrated by the fact that the EU-Turkey Agreement does not differentiate between men and women. It only makes mention of migrants.⁴⁴⁴ Failure to recognise that within this group that has been loosely called ‘migrants’ there may be women in serious need of international protection , highlights the fact that women are not always a priority but are sometimes added into legislation as an afterthought to silence feminists. Blanketly, referring to refugees and migrants as ‘migrants’ erases the asylum seekers especially asylum seekers who are women.

According to Katrina Tomasevski, it is important to note that the use of gender-neutral language in legislative processes makes everyone equal before the law without taking racial,

⁴⁴³ Arvonne Fraser ‘Becoming Human: The Origins and Development of Women's Human Rights’ (1999) 21 *HRQ* 4 at 855.

⁴⁴⁴ EU-Turkey Agreement op cit (n).

gender and cultural backgrounds into perspective. This has the discriminatory effect of aggravating the suffering of those already in situations of inequality.⁴⁴⁵ Gender-neutral language does not combat discrimination against women, it covers, maintains and supports it.

Rights for women must be based on women's lives and not those of men. The fact that legal culture continues to develop within the confines of the masculine influence should not be overlooked; and neither therefore should the under and overtones of patriarchy be overlooked in the manner in which rights for women are dispensed. The neglect of women and especially of refugee women is not coincidental. It is structural and sustained by the system of patriarchy.

Patriarchy is a system.⁴⁴⁶ The word system comes from the Greek word *systema* which refers to a body, a complete amalgamation of compound parts, an arrangement, an organised whole or the interaction of a connected set of things to form a whole. In order for systems to survive they are maintained by structures. A structure can be understood a composite or a part of a unit.⁴⁴⁷ The system of patriarchy is maintained by structures such as the family, media, the state, religion and culture to name a few.⁴⁴⁸

Furthermore, the human rights model was designed with free men as the benchmark for equality and it tries to copy and paste women onto this model without taking the intersectionality of the kinds of abuses, oppression and violence that women face into consideration.⁴⁴⁹ It was designed based on what men believe to be of harm.

The EU-Turkey Agreement may need to be reviewed as its end cannot be justified by its means. It does not serve to protect refugee and migrant women in anyway and it may actually be harming them and their chances of rebuilding their lives.

⁴⁴⁵ Katrina Tomasevski

⁴⁴⁶ Ruchi Anand 'The Human Rights Regime: A Critique of "Universality" in a Patriarchal World' 2 *The Journal of International Relations, Peace Studies, and Development* 1 at .3.

⁴⁴⁷ Own definition.

⁴⁴⁸ Sabine Erika 'Patriarchy and the State' (1986) 3 *Australian J of L and Soc* at 56.

⁴⁴⁹ Manjoo op cit n (n) 2.

Chapter Five

Concluding Remarks and Recommendations

In this final chapter this research will reflect on some of the areas where the European Union as a region, its Member States and legislative policies have failed to ensure that refugee and asylum seeking women are adequately protected. It is through the reflections that this chapter will be able to offer concluding remarks as well as offer recommendations on what the European Union and its Member States can do in order to improve on their protection of refugee women.

This research, with gratitude, notes that the European Union has been offering protection to refugees coming from; among other places, war-torn countries such as Syria, Iraq and Afghanistan but it criticises the protection that is offered as being blanket protection that treats all refugees, regardless of gender as a single unit. This kind of protection does not take into consideration the fact that men and women refugees do not experience suffering or harm in the same way. It is not sensitive to the fact that women, by virtue of being women are prone to other kinds of violence and suffering that are gender-based and sexual in nature.

Further, it also noted that the European Union in some circumstances applied methods of deterrence to handle the 2015 European Union refugee influx and that these methods have now created situations of gross human rights violations in both Turkey and Greece.

In light of the above, this paper respectfully offers these recommendations. They are not meant to undermine the sovereignty of the European Union Member States. As has been discussed in chapter four, statehood and sovereignty are concepts that have evolved and respecting human rights has become a formal and globally recognised characteristic of a sovereign state that is part of the global community.

In summary, the failures of the European Union to adequately protect refugee women exist in the poor treatment of asylum seeking women. This is evidenced by their living conditions in Greek camps. Women in these camps are either at risk of being abused in some way or have already experienced abuse, usually of a sexual nature. Overcrowding has made it difficult for women to be able to access basic rights such as health care, food and sanitation. Failure to adequately protect women is also exacerbated by the EU-Turkey deal which has made mass refoulements possible as well as allowing for the arbitrary detention of women in cruel conditions. The EU-Turkey Agreement discriminates between refugees and puts refugee

women, especially women of Syrian nationality at risk of serious and life threatening harm if they have to be returned to Syria under the one-to-one resettlement scheme.

Additionally, it would seem from the reports on the conditions in some reception centres and camps in Greece that the European Union member States have not adequately discharged their obligation to offer refugees protection. The situation in the camps reveals that women are not safe from physical and sexual harm. They also have little or no access to food, medical facilities, sanitation and proper shelter.

Finally, due to overcrowding, the prospects that the asylum claims of refugee women will be processed timeously are very low with some women reportedly having been stuck the island in these dire condition for up to two years. Neither Greece, Turkey nor the Member States of the European Union seem to be taking the crises in Lesbos seriously as it is reported that the conditions in the camps continue to deteriorate.

In light of these failures, this paper will conclude with the following recommendations:—

It has been argued that the European Union is using the EU-Turkey Agreement to neglect its full duties to refugees and is rather using clever political negotiations to make refugees and migrants who may want to seek asylum in Europe, the obligation of a third country. The third country in this case is Turkey. The EU-Turkey Agreement identifies Turkey as a safe country but the United Nations High Commissioner has pointed out that Turkey is in state of political unrest since 2016, with over one million of its own citizens living as internally displaced persons and there are human rights violations taking place there especially in south-east Turkey. If Turkey is not yet safe for its own nationals, it cannot be declared as a safe country for refugees and migrants, many of whom are fleeing similar situations to what is happening in Turkey.

State sovereignty and refugee law rely on the notion of responsibility sharing of asylum seekers. Turkey is currently responsible for over two million of its own refugees, many of whom are from Syria. The EU cannot be said to be respecting the notion of responsibility sharing if it continues to insist that refugees and migrants who seek asylum in the EU should be deported from Greece to Turkey by means of this Agreement. The notion of responsibility sharing also ensures that refugees are able to enjoy better asylum standards in their host nations but if more refugees are being channelled to Turkey, this is bound to affect the quality of life

of asylum seekers because the limited resources will now be shared among an even greater refugee population.

Turkey's geographical limitation limits it from giving anyone who is not from a European country status as a refugee which means asylum seekers live without proper status and without proper status they are unable to get employment or to participate in other such duties that would improve the quality of their lives. Without full status asylum seekers are also not easily able to integrate into society and move past their refugee experience. The nation of Turkey is therefore encouraged to remove its geographical limitations in order to ensure that its refugee population can enjoy the rights afforded to refugees under the 1951 Refugee Convention and have access to rights and security that makes their lives more meaningful.

Finally the European Union is bound by its own laws but most notably by the Common European Asylum System which contains directives that stipulate a common vision on how refugees ought to be treated. The Common European Asylum System is not explicit in its wording with regards to the protection of women but the Qualification Directive and the Reception Conditions Directive do clearly allude to the protection of women as is implicit in the use of the word 'vulnerable'.

Although the Common European Asylum System is making an attempt to include gender and gender sensitivity in its Directives, they have not been very successful in ensuring the fair treatment of refugee women. Refugee women are not treated badly by legislative texts, they are treated badly by people. While a change in legislative texts is largely welcome by feminist scholars, the real change that needs to happen is in society and in the cultural attitudes towards refugees and refugee women. This should be done in accordance with Article 5 of the Convention on the Elimination of all forms of Discrimination Against Women which states that State parties needs to ensure that stereotypes and cultural attitudes that promote the discrimination of women are done away with. This would include stereotypes and cultural attitudes towards refugee women.

Practical recommendations that have been suggested to ensure the safety of refugee women while they are in camps and reception centres include the establishment of separate sleeping facilities for men and women. The Moira camp can accommodate a capacity of 3200 people but is currently occupied by about 9000. The overcrowding may make it difficult to rearrange the housing arrangements but it does not make it impossible. Women have complained of not being able to go to the toilets or to the showers as they fear that men will

follow them and attack them. The current situation increases the insecurity and vulnerability of women as the risk of getting raped, beaten, harassed or even trafficked becomes even greater in overcrowded camps. The creation of separate facilities; including well lit toilets and showers with locks, will be useful in decreasing feelings of insecurity and vulnerability and will be useful in improving the overall feelings of safety. The power and benefit of the feeling of safety in women should not be taken lightly as it may lead to a decrease in stress, depression and anxiety levels which refugee women are prone to experiencing. With regard to mental and psychological health, the Turkish government should consider increasing the presence of trained professionals such as psychologists and psychiatrists in camps. Furthermore, increasing the presence of guards and patrolling staff at night may also assist in making the camps safer in the evenings.

On the note of adding more staff, European Union officials have themselves reported that sometimes they do not always know what to do in certain situations where they identify that a woman has been raped or is displaying signs of vulnerability. The EU is encouraged to put in place clear policies that outline how survivors of rape or women displaying vulnerability can be assisted. The assistance should be offered privately and discreetly to protect the identity and integrity of survivors as the feelings of shame are often what prevent survivors from being open to assistance.

In some camps it is reported that their entire camp population waits on the medical assistance of between one and three doctors, again more staff should be trained and posted in camps. The right to healthcare is a fundamental human right that should not be denied to refugees and asylum seekers.

In order to speed up the asylum process, more staff should be employed and trained to handle status determination cases and appeals. The problem of not having enough trained staff has resulted in, on one hand, refugees being pushed through the system for the sake of reaching an outcome on their application– without careful considerations being made to application; and undue delays that compound the problem of overcrowding in the camps. If refugees are being pushed through the system for the sake of helping as many people as an official possibly can, officials may possibly be overlooking refugee women who are vulnerable and this means that women may miss their opportunity to get medical and psychological help if it is available.

It has also been reported that women are not being given adequate information with regards to their applications such as the fact that they can lodge applications on their own and

that they do not need to be joined to the husbands or families. Lack of adequate information means that refugee women may miss out on making informed decisions that may be beneficial to their applications for asylum. Once again, posting more trained staff would alleviate the burden on current staff members and potentially improve the quality of asylum-assessments in a way that would be beneficial to women. Additionally, staff should be required to take refresher courses to always keep the information fresh in their minds as well as to ensure that staff are always on the same page and up to date in the event of any changes or developments.

Adequate protection is not a requirement of a high standard but a requirement for basic infrastructure to be put in place in order to ensure that refugee women due to their position of vulnerability and disadvantage are not exposed to further victimisation or abuse. Basic infrastructure in this case may include more trained staff members, more female staff members, installation of more toilets and showers and making sure that the toilets and showers for women are close to their dormitories, setting up medical facilities and setting up facilities for pregnant women to at least have access to basic ante-natal and post-natal care.

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